Alternative dispute Resolution

(Arbitration)

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Alternative dispute Resolution ("ADR")

Overview

- *Alternative Dispute Resolution ("ADR") refers to any means of settling disputes outside of the courtroom.*
- *Alternative Dispute Resolution ("ADR") refers to any means of settling disputes outside of the courtroom. Alternative Dispute Resolution (ADR) typically refers to a method of resolving disputes by means not associated with formal litigation (court), such as mediation, arbitration, facilitation, conciliation, Negotiation and Neutral Assessment.*
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<u>History and forms of arbitral processes.</u>

- *Is not known exactly when formal non-judicial arbitration of disputes first began. Under English law, the first law on arbitration was the Arbitration Act 1697, but when it was passed arbitration was already common. The industrial revolution and the growth of international trade however, brought greater sophistication to a process that had previously been largely ad hoc in relation to disputes between merchants resolved under the auspices of the lex mercatoria.*[1]
- *In general, ADR allows everyone to have an active part in the decision-making process. Solutions are adopted by consensus, and reflect an understanding of the interests of all parties. As a result, the solutions are tailored to the needs of the participants. ADR encourages creative, innovative solutions, moving away from the traditional win/lose results of adversarial proceedings. ADR resolves disputes while preserving relationships, and thereby helps create a productive working environment.*
- *ADR is useful in a wide range of conflicts, such as commercial disputes, professional liability cases, personal injury matters, insurance problems and family and divorce matters.*
- *One common element in all of the ADR procedures is the presence of a person who acts either as the facilitator or decision maker. This facilitator is a neutral person who is capable of providing an unbiased opinion.*

[1] en.wikipedia.org/wiki/Arbitration_in_the_United_States_of_America

Chapter one

The Arbitration

Introduction to arbitration.

- *Arbitration is one of the oldest methods for the resolution of disputes between the parties.*
- *The two most common forms of ADR are arbitration and mediation.*
- *Arbitration is a simplified version of a trial involving no discovery and simplified rules of evidence.*
- *Arbitration hearings usually last only a few hours and the opinions are not public record. Arbitration has long been used in labor, construction, and securities regulation, but is now gaining popularity in other business disputes.*

o *In the field of arbitration, there are three international documents. However, all these three documents deal with the enforcement of foreign arbitral awards. The first is Protocol on Arbitration Clauses signed at Geneva on 24th September, 1923 (commonly known as Geneva Protocol, 1923). It has 8 Articles. It has been ratified by 30 States. However, it is not very popular amongst the States for obvious reasons.*

o *The second is the Convention on the execution of Foreign Arbitral Awards signed at Geneva in 1927 (commonly known as Geneva Convention, 1927).*

This Convention amended the Geneva Protocol in certain respects. According to this Convention "Each High Contracting State was required to recognise as binding and to enforce, in accordance with the rules of the procedure of its territory, arbitration award made in another Contracting State pursuant to an agreement covered by the Protocol."

o *Last, is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed at New York on 10th June, 1958 (commonly known as New York Convention). This Convention gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedures.*

o *Internationally, the United Nations Commission on International Trade Law (UNCITRAL) has prepared Model Law on International Commercial Arbitration. It has been prepared after long deliberations in various meetings of the whole Commission during 18th Annual Session and was adopted on 21st June, 1985.*

The General Assembly of the United Nations, in its Resolution 40/72 of 11th December, 1985, recommended, "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practices.

"So far a large number of countries have adopted UNCITRAL Model Law on International Commercial Arbitration in their domestic legislation on arbitration. It has resulted in achieving uniformity in the law relating to arbitration in these countries. In addition to the Model Law on International Commercial Arbitration, the UNCITRAL has also prepared and published detailed "UNCITRAL Arbitration Rules".

These Rules were adopted by the General Assembly through its Resolution 31/98 on 15th December, 1976, that is much before the adoption of the Model Law on International Commercial Arbitration. Article 1 of these Rules provides that, "Where the parties to a contract have agreed in writing that dispute in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, and then such dispute shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing." Thus, the parties to an agreement can adopt the UNCITRAL Arbitration Rules for the resolution of their international disputes. Except the preparation and publication of these documents, the UNCITRAL as such does not provide arbitration facilities.

- *The most important and oldest institution in the field of arbitration is the International Chamber of Commerce, Paris. The International Court of Arbitration of the International Chamber of Commerce (the "ICC") is the arbitration body of the ICC. The Court does not itself settle disputes. The function of the Court is to provide necessary facilities for the settlement by arbitration of business disputes of an international character in accordance with the Rules of Arbitration of the ICC if so empowered by an arbitration agreement between the parties.*
- *Apart from ICC, another international body engaged in the arbitration is the International Centre for the Settlement of Investment Disputes. It has also framed rules of arbitration. As has been stated above, it is relevant for the resolution of investment disputes only and not other commercial disputes.*

Further, practically every country has one or more bodies or institutions which provide facilities for arbitration and other alternative dispute

resolution methods for resolving commercial disputes. Even though they are national bodies or institutions, they provide all the necessary facilities for resolution of both domestic and international commercial disputes. Only to illustrate, some such bodies or institutions are American Arbitration Association (AAA), London Court of International Arbitration (LCIA), Permanent Court of International Arbitration.

This paper is divided into the following sections

The vast majority of unsettled stockbroker/customer disputes are resolved through arbitration. The use of arbitration as a means of alternative dispute resolution is generally viewed as an efficient manner of resolving the dispute before an impartial panel of arbitrators.

The arbitration process is less formal and quicker than litigation in court. Various arbitration forums have established rules governing the arbitration procedure.

Definition Arbitration

In arbitration, disputing parties take their argument to a neutral third party, the arbitrator, for a binding decision. The arbitrator listens to witnesses and reviews documents before making a ruling.

Under Washington law RCW 7.04, the arbitrator's award is final and binding and may be enforced like a court judgment. There is generally no appeal from an arbitrator's award Arbitration is a process whereby parties involved in a dispute present their cases to an impartial third party for the purpose of rendering a binding solution.

It is not surprising that arbitration became a preferred method of commercial dispute resolution all over the world for a number of reasons. In addition to convenience, flexibility and predictability, it also offers certainty - arbitral awards could be enforced almost anywhere in the world since virtually all trading nations were parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and adopted the jurisdictions of the UNCITRAL Model Law.

An arbitration process is in general not costly, relatively quick and simple. It allows the prevailing party to cover its costs.

Reasons of choice the arbitration

As the number of international commercial disputes mushrooms, so too does the use of arbitration to resolve them. The non-judicial nature of arbitration makes it both attractive and effective for several reasons.

1. *There may be distrust of a foreign legal system on the part of one or more of the parties involved in the dispute.*

2. *In addition, litigation in a foreign court can be time-consuming, complicated, and expensive. Further, a decision rendered in a foreign court is potentially unenforceable.*

3. *On the other hand, arbitral awards have a great degree of international recognition. For example, more than 135 countries have agreed to abide by the terms of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 another reason for choosing arbitration is that the process is administered by a panel of arbitrators who are agreed upon by both parties. These arbitrators may have specialized competence in the relevant field.*

4. *In addition, the confidentiality of the arbitration process may appeal to those who do not wish the terms of a settlement to be known. This is the biggest obstacle to researching international commercial arbitration: as its popularity grows, so does its interest to outside parties. However, because many awards are not made public, it can be frustrating to search for information.*

5. *Finally, arbitral awards are usually final and binding, which avoids a drawn-out appeals process.*

There are essentially two kinds of arbitration, ad hoc and institutional. An institutional arbitration is one that is entrusted to one of the major arbitration institutions to handle, while an ad hoc one is conducted independently without such an organization and according to the rules specified by the parties and their attorneys. On its face, ad hoc arbitration may seem to be less expensive and more flexible.

However, institutional arbitration provides an independent, neutral set of rules that already exist, and it requires that an institution provide services that are critical to ensuring that the arbitration proceeds smoothly. For example, the International Court of Arbitration decides on the number of arbitrators and their fees, appoints the arbitrators, ensures that the arbitration is being conducted according to International Chamber of Commerce Rules, determines the place of arbitration, sets

time limits, and reviews arbitral awards. In addition, an arbitral body will ensure controlled costs, since it will have a pre-determined framework of charges.

How Arbitration Works

Usually, the parties agree to follow the arbitration rules of an agency. These rules define how an arbitrator will be selected, how the case will proceed, and what fees are involved. The parties also must sign a written contract to arbitrate that defines what the arbitrator is to decide, and selects an arbitrator (arbitrators may be attorneys or non-attorneys, depending on the case).

After that, an arbitration hearing is held, often in the arbitrator's office. Each side presents witnesses and other evidence, and is allowed to question the other side's witnesses. Then the arbitrator renders a decision. Most people find arbitration less costly, faster and less stressful than a formal trial.

Mandatory Court Arbitration

A different type of arbitration is available through the courts, where arbitration is sometimes mandatory to certain types of cases. The local courthouse can tell you if arbitration is mandatory in your case. In these kinds of cases, the arbitrator's award is not necessarily final and binding, because a party who is dissatisfied has the right to request a new hearing before the court. But this new hearing will require extra expenses, and if the party who appeals doesn't do better at trial, that party is required to pay the other side's expenses as well. As a result, the arbitrator's decision is usually accepted by both parties.

Section one

Mediation

Introduction

Historically, legal disputes have been resolved either by litigation or by arbitration. Mediation (a form of ADR) is a new way to settle commercial disputes. Litigation is quite unlike mediation, but some consider that arbitration is a form of ADR and similar to mediation. In fact the two are fundamentally different.

1. What is Mediation?

Mediation is a term with a very wide definition and generally covers any form of dispute resolution, other than through court process. Strictly speaking the term "alternative" may be something of a misnomer. Most forms of ADR are used hand in glove with either litigation or arbitration

ADR is now, however, practically synonymous with mediation. There are essentially two types of mediation; facilitative and evaluative. Facilitative mediation is by far the most common model used in England and Wales for the resolution of commercial disputes. Evaluative mediation is a rather different animal. Although the lines of distinction between the two may appear to blur, in reality the difference between them is profound. In evaluative mediation at some point the mediator will express a view, (probably simultaneously to all parties) on the strengths and weaknesses of their respective cases. He or she might indicate which arguments might succeed and which might fail.

The mediator might even express a view on what might constitute a fair and reasonable settlement. This will not happen in facilitative mediation. Through out the rest of this paper I am referring only to facilitative mediation. In facilitative mediation a neutral third party, the mediator, assists the parties to settle their disputes. The mediator is the catalyst. The presence of an independent third party is the key distinguishing feature of the process. Facilitative mediation is a process of managed negotiation[2].

2 Hill Taylor Dickinson" A Comparison Between Arbitration and Mediation "http://www.iclg.co.uk/khadmin/Publications/pdf/765.pdf

2. How Mediation Works?

Mediators are trained in helping parties work out a settlement agreement or compromise. Mediators do not issue orders, find fault, or make determinations. Instead, mediators help parties to reach a settlement by assisting with communications, obtaining relevant information, and developing options.

Mediation agencies can often provide mediators with a background in the area of dispute (family law, business disputes, labor relations, etc.). Mediators are often attorneys, although non-attorney mediators are commonly used for certain types of cases.

Mediation sessions are usually held outside the courthouse, often in the mediator's office. Although mediation procedures can vary, the parties usually first meet together with the mediator informally to explain their views of the dispute.

Often the mediator will then meet with each party separately. The mediator discusses the dispute with them, and explores possible ways to resolve it. It is common for the mediator to go back and forth between sides a number of times. Most disputes will be resolved, and often the parties will then enter into a written settlement agreement, which is a binding contract.

Many people report a higher degree of satisfaction with mediation than with court, because they can control the result and are part of the solution. And agreed-to settlements are much more likely to be voluntarily complied with by all sides. Under Washington law, everything said at a mediation session is confidential and cannot be used later if the dispute is not settled. Thus, you have little to lose by trying mediation.

3. How does Mediation differ from Arbitration?

Compulsory

Arbitration is a form of compulsory process. Parties to a contract may have agreed in advance that in the event that a dispute arises between them, that dispute should be referred to arbitration according to a particular system of law and a particular procedure. Alternatively, there may be an ad hoc reference to arbitration after a dispute has arisen. In either case, if there is a binding arbitration agreement the parties can be compelled to participate, on risk of penalty.

Control of Process - Orders My comparison is largely made on the basis that English law applies. Under English law, notably the Arbitration Act1996, and under most arbitration procedural rules, the arbitration tribunal will be the master of the process and will have authority over the parties in certain respects (supported by the English Court where necessary).

This will permit the arbitration tribunal to make orders, like setting down the timetable for the arbitration process or ordering one of the parties to disclose certain categories of document in the proceedings. In the event that they do not comply the arbitrators may be at liberty to impose penalties. This is quite unlike mediation. Privacy Arbitration is private. This is one reason why many Commercial bodies prefer that their disputes are always referred to arbitration.

There is then less risk that any element of the arbitration will find its way into the public domain, such as the names of the parties, the issues at stake, the pleadings, the underlying documents, any witness statements, any experts reports and moreover the Arbitration Award itself. In this respect arbitration and mediation are similar, but certainly not identical. The key difference is that there is no guarantee that arbitration proceedings will remain private. If an Award can be appealed, then the trial of that appeal will, save in the most unusual circumstances, be public and the names of the parties and perhaps all of the issues between them will then find their way into the public domain at trial. An Award may equally become public through an enforcement process or through pursuit of an indemnity claim. Decision Making - Award Arbitration is a decision making process.

At the end of the process the arbitration tribunal will make findings of fact and conclusions of law and thereby reach adjudication on the issues which remain live between the parties. In the dim and distant past many disputes were resolved in trial by battle: one lived one died. Legal proceedings are a fine set of rules to allow parties to obtain an adjudication to resolve disputes, even quite ferocious disputes, in a disciplined and effective manner, but without the need for bloodshed. Legal process, whether arbitration or litigation, may save bloodshed but there is still generally one winner and one loser.

Enforcement

Obtaining an Arbitration Award is not necessarily the end of the story. If the successful litigant does not have in his hands security to cover his claim (for example a bank guarantee, a letter of undertaking, or an

injunction freezing assets or property) that litigant may then be forced to pursue his adversary at significant cost and in some cases for considerable time seeking to obtain satisfaction through enforcement. Arbitration Awards can be readily enforced in England and Wales as a judgment and abroad under the 1958 New York Convention. 136 nations are at the last count (I believe) now parties to that Convention, Pakistan an original signatory, having just joined (acceded) in July 2005.

Disadvantages

Despite the many advantages of arbitration, it suffers from certain shortcomings. Indeed, these are the very factors both litigation and arbitration which prompted the original development and latterly the growth in the use of Commercial mediation.

This is certainly not to denigrate litigation or arbitration which is in many respects excellent (and probably indispensable).

And these are certainly generalisation, but arbitration is:- Slow; Costly;

Adversarial; and Risky. Many of these failings are equally applicable to litigation and arbitration whether in the UK or abroad.

Slow

Arbitration can be slow to get a result, in other words to bring a case to a final hearing. Although expedited hearings can be held, as a general rule it can take months and in some cases years. Thereafter, there may be further delay following the conclusion of the hearing waiting for the Arbitration Award to be published. Depending on the complexity of the matter, this can take months.

There may then be yet further delay in seeking to enforce the Final Award (or perhaps dealing with any appeal before launching into the process of enforcement).

Costly

As a broad generalisation, Arbitration (or litigation) is costly in most legal systems. It is generally necessary to make an initial review of a claim, to gather some initial papers and request an early legal assessment. Once the issues have been identified and evidence gathered, statements may be taken and then it may be necessary to prepare a formal experts' report. There will be the arbitrators' fees (for

interlocutory and final hearings) and all costs associated with the hearings (rooms etc).

Under some arbitration procedures substantial fees are also payable to the body administering the Arbitration at certain stages. It should not be overlooked, however, that it may be necessary to go through some, perhaps many, of these procedures to put a case into the best shape to negotiate a settlement.

Adversarial

The whole process of arbitration, like litigation, is adversarial. The very character of the process can in someway entrench disputes and exacerbate tensions between the parties which in turn then can make disputes difficult to settle.

- ***Risky***

There is always risk in litigation or arbitration. The prospects of success or failure in any particular case can be assessed (in some measure) at various stages, but new

documents and information often emerge during the course of the dispute and one can never predict with certainty how an expert or a factual witness might perform at a final hearing (or trial) nor what final Award (or Judgment) will be given. A significant amount of time and cost can be devoted to a dispute before surprises emerge.

- ***Mediation - Voluntary***

By contrast, mediation is voluntary. In court process the court can "encourage" the parties to refer their dispute to mediation with the threat of costs penalties. This does not apply with arbitration. Since the whole process is voluntary parties can walk out of mediation whenever they wish and, although it is rare, sometimes they do just that. This would-be unthinkable in arbitration. Without Prejudice Mediation is without prejudice. Anything created solely for the purpose of the mediation and anything said on the day is without prejudice.

In the event that no settlement is reached neither party can rely on any documents created for the mediation nor on anything said on the day in the course of the formal mediation "event".

This is of course only the CAE under English law (and the laws of the various Common Law nations). Care has to be exercised in conducting

mediations where the underlying dispute is Subject to a foreign system of law and procedure.

Private & Confidential

Mediation is private and confidential. Nothing which is said in the course of the mediation can be discussed outside the mediation nor revealed to any third party.

This stipulation of confidentiality is generally embodied in the Mediation Agreement which is signed (usually on the day to regulate the mediation process. Facilitative mediation is generally conducted by a series of meetings. Usually the mediation opens with a joint meeting attended by the mediator and all the parties. When that joint meeting is concluded, the parties break up into separate private rooms and the mediator effectively conducts shuttle diplomacy between them.

Anything which is said at the joint session is confidential. Furthermore, there is a sort of double confidentiality. Anything which is discussed in the private sessions is also confidential and cannot be revealed by the mediator to the other party or parties unless and until he is authorised by the revealing party to do so. This is one of the most unusual and effective features of the process. By contrast, would you reveal to a judge or arbitrator your weaknesses or details of any commercial or financial pressures you face?

Obviously not. Under this cloak of confidentiality the parties often reveal to mediators the most extraordinary things, which the mediators can then use (with their authority) to fashion a bargain between the parties. But again a note of caution.

First, if foreign systems of law apply, beware that the duty of confidentiality may not exist or alternatively may not be enforceable.

Secondly, and income senses perhaps more importantly, once something is said or revealed it cannot be unsaid. If a case does not settle anything which is revealed at the mediation even if it cannot be used in the formal arbitration might then influence the conduct of that arbitration. Indeed it might influence the conduct of the parties generally in their commercial dealings from that point onwards. As a matter of strict proof or Evidence, parties may be then alerted to things they did not previously know.

They may be prompted to hunt down alternative sources of evidence to assist them in proving their case later at a final hearing. This is one illustration of the care that is needed in participating in mediation.

Mediation is not merely a matter of common sense. It is a Skill No orders the mediator has control over the process but not over the Resolution of the dispute. So he can decide who should take Part in joint meetings, and who should take part in private Meetings (just solicitors or just the parties or just the experts). He can also require the parties to prepare Summaries of their best points or schedules of claims. But he cannot make any orders as such. A mediator unlike an arbitrator cannot order the production of documents. So if there are crucial documents that you must have in handling a dispute, do not go to mediation until you have got them. Whether documents ever are crucial of course is a matter of Judgment. Arbitration and litigation is not physics; it is not a discipline of perfection. No Judgment / No Award Against this background, perhaps it is obvious that the mediator has no power to make a final determination of issues between the parties. He will not issue an Award or the equivalent of a judgment; nor will he express any view on the merits of each party's case (cf: evaluative mediation).

Either the parties reach a settlement between them or the mediation will break up without a resolution. The parties will be left either to pursue formal legal process, perhaps to Negotiate or to reconvene mediation on a later day Enforcement?

When a settlement agreement is signed it is probable that the parties will comply with its terms. Indeed, I am not sure that I have ever heard of anyone reneging on a settlement made by mediation. Nonetheless, it may be possible to set out the terms of settlement in an Arbitration Award by consent. This would facilitate enforcement. Alternatively it might be necessary to sue on the settlement agreement, but this should be far more straightforward than arbitrating the original claims and counterclaims.

Advantages

Mediation is certainly not a universal panacea. Broadly, however, by comparison to the four core criticisms of arbitration (and litigation) mediation is:-

quick (slow);"*cheap*" *(costly);collaborative (adversarial); and reduces risk to a minimum (risky).Quick However long or short the preparation for a mediation(which can be weeks or months) in the usual model of facilitative mediation in the UK the final mediation "event" takes up just one day; although it can be a very long day.*

Mediations are often projected to start at about 10.00am and provisionally to conclude at 6.00pm. However it is frequently the case

that they run on later, sometimes into the small hours. There are a number of court schemes which provide for a much tighter timetable. For example the Central London County Court has a scheme which provides for a mediation of three hours concluding at 7.30pm. When it gets to7.30pm the cleaner comes in and throws everybody out. This tight timetable can work remarkably well. But, even if it is4 or 5 hours, or 12 or 14 hours it is much faster than a trial or a hearing.

"Cheap"

Cheap is a relative term. The standard price for a mediator for a commercial mediation in London is about £4,000 for one day's preparation and for a mediation taking up one business day. Add to that the cost of rooms and refreshments. Add to that the cost of each party getting their solicitors (and/or barristers) to prepare the case, an essential part of the process. There is some careful work to be done just for the mediation which may be a cost which would not otherwise be incurred in the running of arbitration. The most obvious example is a Mediation Summary, distilling the essential points to no more than about ten pages. Add to this the time in putting together a bundle of open (and perhaps confidential) materials for the common use of the mediator and the parties. Certainly all these individual items of costs willable into insignificance against the cost of running a formal arbitration through the standard process of pleadings, disclosure, witness statements, expert reports, a final hearing and any appeal and enforcement. But again bear in mind it may be necessary to go through at least some, many or most of these formal stages in order to put the case into the best state to negotiate an advantageous settlement. Although mediation can be conducted before any form of legal processes started generally mediation does not take place in isolation.

Collaborative

There is often a common sense of shared purpose in mediation. Both or all parties may really want a deal (the more so if the dispute has been long running) and they are often keen to use the mediation day to achieve just that. Mediations may start with a joint meeting at which some very harsh things are said; there may be a certain degree of posturing and positional bargaining, but later in the day the serious work starts and true agendas start to emerge. Most parties turn up to mediation because they want to settle, and it is rarely a process of soft compromise.

Risk Management Settlement through mediation eliminates the risk of failure at final hearing or a final appeal.

4. When should Mediation be used?

Some say the proper approach to any dispute is to negotiate, if that fails mediate and if that fails arbitrate (or litigate), but that is not always appropriate.

As a generalisation mediation should only be used when the case is "ripe"; that is when both or all sides to the dispute recognise that they have an incentive to settle. When this should be is a matter of fine judgment and will differ from case to case. In this respect every case is unique.

Should it be after exchange of letters before action, when an outline of the claim is set out? Should it be after an exchange of pleadings, when the issues have been narrowed?

Should it be after disclosure of documents when the evidence to evaluate those pleadings has been disclosed?

Should it be after exchange of witness statements when the evidence on both sides should be that much clearer?

Should it be finally after exchange of experts' reports? What is obvious is that most (say 99%) of all disputes settle, whether they are subject to litigation or arbitration. Many of these cases settle at the 11th hour just before trial or a final hearing. Even though it is not trial by battle, at this point much of the pain has already been suffered and there is blood on the floor.

If there is to be a saving in cost and if the many other benefits of mediation are to be accessed; it is wise to engage in mediation at the earliest possible stage. When Should Mediation not be used? There are some key things that mediation cannot achieve. Mediation cannot interrupt a time bar.

So there is no point embarking on the process of the preparation for and Attendance at mediation without ensuring that a time bar has been protected. Mediators have no powers over the parties (other than the limited authority I have described) and certainly have no power over third parties, like banks. Mediators cannot grant protective orders, for example freezing orders (injunctions) and search and seizure orders designed to preserve money or assets for the purpose of enforcement, or alternatively to locate and preserve evidence for the fair resolution of a dispute. Logically, therefore, one should make an evaluation, take any protective steps that are necessary (and available) and then embark on

mediation (perhaps in parallel to an arbitration process designed to flush out documents another evidence).In what other circumstances should mediation not be used?

Obviously because of its essentially private nature there is no point is using mediation if one of the key objectives in any dispute is to obtain a precedent. But this is hardly likely to be a consideration in a dispute which is subject to a binding arbitration agreement. Arbitration Awards are generally private and are not the vehicle by which Precedents are created. Again, there is no purpose in using mediation to resolve a Dispute if a key objective is publicity. The whole mediation process is wrapped in a blanket of confidentiality and any final resolution, in the form of a signed settlement Agreement will never see the light of day. Most Mediation Agreements require there to be an agreement in writing for a settlement to be concluded. Those settlement agreements are subject to the same duties of confidentiality which apply to the rest of the mediation process.

5. Why is Mediation not used?

A survey conducted by CEDR was published in Lloyd's List on 18th January 2006. The conclusions of that survey, on the reasons for lack of use of mediation, include these: - First, a lack of knowledge of (or perhaps familiarity with) the process at a senior management level. Second, an unfounded fear that mediation is a sign of weakness.

Thirdly, that mediation was not mentioned by clients' legal advisors. Fourthly, only 7% of businesses have a dispute Resolution policy. Finally, only 2.45% of industries have a collective dispute resolution policy. Many industries lack a standard clause or clauses and a standard Mediation Agreement and Mediation Procedure to which all can subscribe with confidence. A corollary of the lack of industry standard procedure means that there is a lack of "compulsion" to mediate in any business sector where arbitration is common.

Legal proceedings which are brought in the English High Court of Justice will almost inevitably find their way at some point to mediation, if they are not settled before trial. This is not true of arbitration. The insertion of an appropriate Mediation Clause into standard contracts would change this over night. Meanwhile, the survey also shows that there is a huge hidden cost of management time devoted to running legal disputes which might perhaps be better devoted to other work within a business.

6. Why is Mediation effective?

First, there is no doubt that mediation is an extremely effective way to settle commercial disputes. There is a very large number of mediation service providers but no central body in England and Wales recording mediation statistics. However, anecdotal evidence from solicitors, barristers, mediators, and mediation service providers broadly confirms that between 75% and 80% of disputes which are referred to mediation settle either on the day or very shortly thereafter. In some respects it is an astonishingly effective process. Some of the most intractable cases settle, even those involving colorful allegations of fraud or dishonesty, the type of disputes which are generally considered the most problematic to resolve. So just why is it effective? There are essentially four main reasons. Independent Third Party First, it involves an independent third party. Mediation has its roots in international diplomacy and this can be seen in how the mediator after the usual opening session when all the parties are together operates as a trusted diplomat shuttling between two or more sides and drawing together the threads of the deal. But what exactly do they do? They all work in different ways, partly through their character and partly through their training and expertise.

Certainly there is no set formula but there are certain common threads. The mediator must be entirely neutral and independent. The mediator brings afresh and trusted mind to what is often an old problem. Trust and integrity are key watch words. His role is to aid communication between the parties, to assist them to overcome emotional blockages, to focus their attention and effort on the problems and moreover their solutions. He can help each side to understand the other side's case or even their own case (and its weaknesses, which they and sometimes their advisors have been unable or unwilling to look at). Mediators can suggest new avenues to explore, to identify and work to overcome deadlock, to unlock and release any of the entrenched positions and in some cases the ill feeling that can accumulate in the course of a dispute. Decision Makers

Secondly, mediation involves decision makers, rather than just lawyers. It is essential that a person with full authority to settle the dispute attends on the day. Strictly speaking full authority means the authority to settle anywhere on the full spectrum from 0% to 100%. It is understood that those who attend often do not have wholly unlimited authority but generally they do have authority to make any deal within sensible parameters.

The fact that they are there and participating in the process is crucial. Timetable, Structure,

Dynamics thirdly, a key feature is the timetable, the structure and the dynamics of the process. There is a dense concentration and rush of adrenaline with the speed and clarity of thought that this often brings. Many people say if parties can negotiate to settle their disputes they should do so and isn't mediation after all just a process of managed negotiation? Absolutely; but often parties cannot negotiate for one reason or another. Some lawyers are highly skilled in identifying risk in litigation at an early stage and seeking resolution by negotiation, but it takes two to tango. To strike a deal all parties must engage in negotiation and shrug off personal struggles and even vendettas. Even then the best efforts maybe frustrated.

The more complex the case and the more parties are involved the more difficult it is to tango. You cannot dance with six people. By contrast, negotiations can drag. They have no timetable (other than the cold chill of an approaching hearing or a deadline to produce documents or statements). There might be six parties involved and negotiations can break down at the whim of one. When all attend mediation, prepare for it in advance in accordance with a set timetable and then participate actively on the day, all are drawn in. Shared Sense of Purpose Of course it is accepted that some parties go into mediation with absolutely no intention of settling. Their only purpose in attending (if they have not been compelled by a court to-do so) is to try to find out as much as they can about the other side's case while giving away as little as possible about their own. But, looking at the statistics of settlement, these are probably the minority. Most cases reach a point where all parties want to settle and facilitative mediation makes best use of that shared sense of purpose. Unusual Deals There are other reasons. Through mediation disputes can be resolved by deals which go way beyond any kind of apportionment of the issues between the parties or any sort of adjudication of who is right and who is wrong. The classic tale told about unusual deals is this:-

"There was an argument between two junior chefs over an orange. They came to blows in the kitchen. The head chef intervened. Both men insisted they wanted the orange, it was the last one in stock, and they had to have it to prepare lunch that day. Neither could be satisfied if the other was given the whole orange. The chef thought about it for two minutes, picked up a meat cleaver chopped the orange in two and gave half to each sous chef.

Result: Neither sous chef was happy. The first only wanted the skin for the zest in a sauce. The second needed all of the fruit to pulp for a juice. Neither could make the dessert of his choice with half an orange and both

went home unhappy" .Mediation might solve such a problem, but adjudication cannot. But obviously there are commercial examples.

There might be a dispute over an insurance policy; are the insurers compelled to pay or not? If that was referred to arbitration tribunal there would be findings of fact and conclusions of law. Is the policy binding?

Are the Underwriters entitled to avoid it? Is there a breach of warranty, does the policy cover the circumstances of loss? Was the property lost by an insured peril? If it goes to a hearing both will take the risk of losing. However through mediation they might negotiate the settlement of that claim and perhaps a deal about future business, the payment of premiums by installments, the adjustment of sums insured over say a fleet of ships and all these as concessions as part of a global deal.

No arbitration tribunal (or court) could order such a solution. Substitute Day in Court another factor is that mediation is a substitute for a day in court, without the risk and cost of a trial. The parties can say exactly what they think about the other side directly to the other side. That is never going to happen in court or in an arbitration tribunal where there is a fine structure for the running of the case. The parties have an opportunity to vent their feelings. This can be cathartic; it can release pent up tension that would otherwise preclude negotiation. Relationship and Reputation Mediation minimizes the risk of damage to relationships and to reputations. Instead of being evermore deeply entrenched in an adversarial process the senior parties, the decision makers, can be engaged in constructive discussion with their counterparts in a manner that simply cannot and will not be achieved through traditional dispute handling.

Their relationship may even be enhanced. Individuals might adopt a particular stance in handling a particular problem and to stick by that stance even when evidence emerges to suggest that it is unwise. The ultimate damage to reputation is to those who feel then compelled to go into the witness box to give evidence only to find that their evidence has been treated as unsatisfactory by an arbitration tribunal.

7. Conclusion

Mediation works and cases settle. Mediation process is a skill and it repays understanding and preparation. It is a process that is here to stay. A standard clause(s) and procedure for particular industries would expand the use of mediation. Mediation may not be for all cases but it has enormous scope.

Differences between Arbitration and Mediation

The main difference between arbitration and mediation is that in arbitration the arbitrator hears evidence and makes a decision. Arbitration is more like court because parties still provide testimony and give evidence similar to a trial but is usually less formal.

In mediation, the process is a negotiation with the assistance of a neutral third party. The parties do not reach a solution unless all sides agree.

Making Use of Arbitration or Mediation

Usually an administrative agency is used for either arbitration or mediation. The agency helps the parties understand how to use these alternatives, aids in the selection of a mediator or arbitrator, and handles all details such as scheduling and fees. Administrative agencies may be run by the government, by charitable or business organizations, or be private businesses. Usually the agency will, at your request, contact everyone involved in the dispute to explain to them the benefits of using mediation or arbitration. You can locate an administrative agency through a variety of sources. The yellow page, under Arbitration or Mediation, has a listing of such agencies. In addition, many counties have a dispute resolution center that can either provide such services or refer you to a more appropriate agency. As with any other professional service, before you hire an administrative agency you should check it out. How long has it been in existence? How much experience does it have with the type of dispute you are involved in? Can it provide references? Don't be afraid to ask questions.

Costs and Fees

Arbitration or mediation is usually less expensive than going to court. Some organizations provide services either without charge or on a sliding scale, while other organizations charge professional fees. The fees will depend on the organization used, the type of dispute, and background of the mediator or arbitrator.

Section 2
CONCILIATION

Definition Conciliation

Conciliation is the process by which one or more independent person(s) selected by the parties to an agreement generally by mutual consent, either at the time of making the agreement or subsequently when a dispute has arisen between them, to bring about a settlement of their dispute through consensus between the parties by employing various persuasive and other similar techniques. It is a process of confidence and faith.

Sometimes, and in some systems it is also called mediation. There may be technical or legal differences between the two expressions, namely, conciliation and mediation, but for the present purpose the expression "conciliation' is used to refer to both the processes, namely, the conciliation and mediation.

Conciliation is an effective means of alternative dispute resolution and can be usefully deployed for both international as well as domestic disputes, except that in the conciliation of an international dispute certain facts assume greater importance than they would in a domestic conciliation.

United Nations Commission on International Trade Law (UNCITRAL) has prepared and circulated "Conciliation Rules'. These Conciliation Rules were adopted by the UNCITAL at its thirteenth session after consideration of the observations of Governments and interested organizations. The General Assembly of the United Nations has also adopted them through a Resolution 35/52 on 4 December, 1980. The U.N. has recommended, "The use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation". The UNCITRAL Conciliation Rules contain 20 Articles.

The countries who have adopted the Model Law on International Commercial Arbitration of UNCITRAL have also adopted the Rules of Conciliation of the UNCITRAL or other international institutions and have enacted a composite law called Arbitration and Conciliation Act. Such statutes provide for the resolution of disputes through either of these methods, that is, arbitration or conciliation.

Many other international organizations and institutions have issued conciliation rules for the resolution of disputes between the parties. The International Chamber of Commerce has promulgated, "ICC Rules of Optional Conciliation". The Preamble to these Rules says that, "Settlement is a desirable solution for business disputes of an international character. The International Chamber of Commerce therefore sets out these Rules of Optional Conciliation in order to facilitate the amicable settlement of such disputes".

The conciliation process can be commenced by either party to the dispute. When one party invites the other party for resolution of their dispute through conciliation, the conciliation proceedings are said to have been initiated. When the other party accepts the invitation, the conciliation proceedings commence. If the other party rejects the invitation, there are no conciliation proceedings for the resolution of that dispute. Generally, only one conciliator is appointed to resolve the dispute between the parties. The sole conciliator is appointed by the parties by mutual consent. If the parties fail to arrive at a mutual agreement, they can enlist the support of any international or national institution for the appointment of a conciliator. There is no bar to the appointment of two or more conciliators. In conciliation proceedings with three conciliators, each party appoints one conciliator.

The third conciliator is appointed by the parties by mutual consent. Unlike arbitration where the third arbitrator is called the Presiding Arbitrator, the third conciliator is not terms as Presiding conciliator. He is just the third conciliator. The conciliator is supposed to be impartial and conduct the conciliation proceedings in an impartial manner. He is guided by the principles of objectivity, fairness and justice, and by the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. The conciliator is not bound by the rules of procedure and evidence. The conciliator does not give any award or order. He tries to bring an acceptable agreement as to the dispute between the parties by mutual consent. The agreement so arrived at is signed by the parties and authenticated by the conciliator. In some legal systems, the agreement so arrived at between the parties resolving their dispute has been given the status of an arbitral award. If no consensus could be arrived at between the parties and the conciliation proceedings fail, the parties can resort to arbitration.

A conciliator is not expected to act, after the conciliation proceedings are over, as an arbitrator unless the parties expressly agree that the conciliator can act as arbitrator. Similarly, the conciliation proceedings

are confidential in nature. Rules of Conciliation of most of the international institutions provide that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings,

(a) The views expressed or suggestions made for a possible settlement during the conciliation proceedings;

(b) Admissions made by any party during the course of the conciliation proceedings;

(c) Proposals made by the conciliator for the consideration of the parties;

(d) the fact that any party had indicated its willingness to accept a proposal for settlement made by the conciliator; and that the conciliator shall not be produced or presented as a witness in any such arbitral or judicial proceedings.

Model conciliation clause (UNITAR)

"Where, in the event of a dispute arising out of or relating to *this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force."*

Model conciliation clause

"If any dispute arises between the parties out of or relating to this contract, or in respect of any defined legal relationship associated therewith, the parties agree to refer the same to sole conciliator for amicable settlement. The conciliator shall be appointed by the parties by mutual consent.

If the parties shall fail to arrive at an agreement, the conciliator shall be appointed by_________ (give the name of any person or institution). The conciliation shall be conducted in accordance with the Rules of Conciliation of __________ (give the name of any institution).

(The parties can mention specific technical or other qualifications and experience, if any, of the conciliator)

MINI-TRIAL

The resolution of disputes through this alternative dispute resolution method is called mini-trial. It is relatively a new device for the resolution

of disputes. Sometimes it is also called as "exchange of information". It has nothing to do with a criminal or any other trial. This procedure is only named as a mini-trial. In fact, in this process, no adjudication process takes place. Various national and international institutions engaged in providing arbitration and mediation facilities have made rules for "mini-trial". The parties to a dispute can select and adopt any such institution and its rules for the resolution of their dispute through mini-trial. It is also a time bound process. It is expected that under normal circumstances, the entire process of mini-trial should be completed within 90 days from the date of its commencement.

The major difference between the conciliation and the mini-trial is that in conciliation, the conciliator tries to bring about an agreement between the parties. In mini-trial, the neutral adviser tells the senior management personnel of the parties of the respective strengths and weaknesses of the case to the parties. Thereafter, the senior management personnel of the parties can take an appropriate decision about their dispute. According to American Arbitration Association's Mini-trail Procedures, "...The mini-trial is a structured dispute resolution method in which senior executives of the parties involved in legal disputes meet in the presence of a neutral adviser and, after hearing presentations of the merits of each side of the dispute, attempt to formulate a voluntary settlement."

The process of mini-trial can be commenced by either party to the dispute. When one party invites the other party for mini-trial and send a written invitation identifying the subject of dispute, the process of mini-trial is said to have been initiated. When the other party accepts the invitation in writing, the mini-trial proceedings are deemed to have commenced. If the other party rejects the invitation, there is no mini-trial proceeding. Generally, only one neutral adviser is appointed to resolve the dispute between the parties. The parties, if they so desire, can have more than one neutral adviser also. The neutral adviser(s) is appointed by the parties by mutual consent. If the parties do not wish to appoint their own neutral adviser(s) or do not reach agreement on any particular name, they may enlist the support of any national or international institution for the purpose. The neutral adviser is expected to possess special legal or technical knowledge and experience about the subject matter of dispute. A mini-trial is also a time bound process.

In mini-trial, first, the parties explain their respective cases and then the neutral adviser discusses the nature of dispute with the senior executives of both the parties. If necessary, he may also discuss the matter with the

experts, if any, proposed to be produced by the parties. Thereafter, he indicates his views of the respective strengths and weaknesses of each side, the aspects of the case which are reasonably clear and those which are uncertain.

The neutral advice also answers the questions or doubts the senior executive may have. This process helps the parties to gain a better understanding of the issues and the merits of their respective case. The senior executives are then expected to enter into a mutual discussion with a view to arriving at a settlement. The neutral adviser only assists them in such discussions, as a facilitator, and not as a judge of the dispute. The mini-trial terminates when the parties have arrived at an agreed settlement or the neutral adviser makes a written declaration to the effect that further efforts at settlement of the dispute through mini -trial are no longer justified.

The model clause (mini-trial)

"The parties shall try to resolve any dispute, difference or claim arising out of or relating to this agreement through negotiations. If it is not so resolved, the parties shall resolve the same through mini-trial. The sole neutral adviser shall be appointed by the parties by mutual consent. If the parties fail to arrive at an agreement on any name, the neutral adviser shall be appointed by ______ (give the name of any institution). The mini-trial shall be conducted in accordance with the rules of procedure for mini-trial of _______ (give the name of any institution).

If the dispute is not resolved by mini-trial procedure within 90 days of the initiation thereof, or if either party will not participate in such procedure, the dispute shall be referred to arbitration."

Chapter two

Arbitration agreement

CONCEPT AND ENFORCEMENT OF ARBITRATION AGREEMENT

On the completion of this chapter, you will be able to:

- *Compare the meaning of the terms: "arbitration agreement", "arbitration clause" and "submission agreement".*
- *Recognize the consequences of including an arbitration clause in a contract.*
- *Describe the meaning and enforcement of the term "arbitration agreement" under the Model Law.*

Section one

1.1 ***Definition. Arbitration agreement, arbitration clause and submission agreement.***

In general, the arbitration agreement provides the basis for arbitration.

It is defined as an agreement to submit present or future disputes to arbitration. This generic concept comprises two basic types:

a) A clause in a contract, by which the parties to a contract undertake to submit to arbitration the disputes that may arise in relation to that contract (arbitration clause); or

b) An agreement by which the parties to a dispute that has already arisen submit the dispute to arbitration (submission agreement).The arbitration clause therefore refers to disputes not existing when the agreement is executed. Such disputes, it must be noted, might never arise. That is why the parties may define the subject matter of the arbitration by reference to the relationship out of which it derives. The submission agreement refers to conflicts that have already arisen. Hence, it can include an accurate description of the subject matters to be arbitrated. As we shall discuss later, some national laws require the execution of a submission agreement regardless of the existence of a previous arbitration clause.

In such cases, one of the purposes of the submission agreement is to complement the generic reference to disputes by a detailed description of the issues to be resolved.

1.2 Enforcement of an arbitration agreement

By entering into an arbitration agreement, the parties commit to submit certain matters to the arbitrators' decision rather than have them resolved by law courts.

Thus, the parties:

a) Waive their right to have those matters resolved by a court; and

b) Grant jurisdictional powers to private individuals (the arbitrators).We shall call these two main effects of the agreement "negative" and "positive", respectively

.1.2.1 ***Negative enforcement: Lack of jurisdiction of courts***

An arbitration agreement precludes judges from resolving the conflicts that the parties have agreed to submit to arbitration. If one of the parties files a lawsuit in relation to those matters, the other may challenge the court's jurisdiction on the grounds that the jurisdiction of the courts has been waived. The judge's lack of jurisdiction is not automatic, nor can it be declared exofficio. Instead, it must be raised by the defendant no later than when filing the answer to the complaint. That is so because arbitral jurisdiction is waivable, and the waiver would be presumed if the plaintiff filed a complaint and the defendant failed to challenge the court's jurisdiction. To sum up, once a conflict has arisen over any of the subjects included in the arbitration agreement, the courts will have no jurisdiction to resolve it unless both parties expressly or tacitly agree to waive the arbitration agreement.

1.2.2 ***Positive enforcement: the "submission agreement"***

The arbitration agreement grants jurisdiction to arbitrators.

By "jurisdiction" we mean the powers conferred on arbitrators to enable them to resolve the matters submitted to them by rendering a binding decision.

The negative enforcement of the arbitration agreement is universally accepted and does not depend on the kind of agreement. Conversely, the

positive enforcement is inextricably linked to the applicable law. That is so because some local arbitration laws still do not grant the arbitration clause an autonomous status. In fact, some traditional laws require that, even when there is a previous arbitration clause, the parties execute a new agreement called "submission agreement", which must contain the names of the arbitrators and clearly identify the matters submitted to them.

When a submission agreement is required, the arbitration clause becomes insufficient. Once there are concrete issues in dispute, the parties must enter into an agreement, whether or not they have previously signed an arbitration clause. Under those laws, the arbitration clause at best compels the parties' to sign the submission agreement.

However, since this obligation is not always complied with voluntarily, such laws provide for a court's intervention to enforce the arbitration clause. The judge must supplement the content of Submission agreement and his judgment – which replaces the will of the party who has refused to sign it – is treated as a submission agreement. Lack of cooperation by one of the parties in the execution of the submission agreement or insuperable differences between the parties as to what should go into it are settled by a court.

The legal requirement of the submission agreement as a condition to arbitrate has been considered one of the main obstacles to arbitration, even in the cases in which it could be supplied by a court. In fact, if one of the parties resists arbitration, the refusal to execute the submission agreement allows it to obstruct the constitution of the tribunal and delay the arbitration itself. This forces the opposite party to enter into a judicial process to obtain the submission agreement. Arbitration is therefore deprived of one its main comparative advantages, i.e. expeditiousness. That is why, taking the concept from the Geneva Protocol on Arbitration Clauses, the New York Convention and the new arbitration laws, modeled upon the Model Law, do not require a submission agreement and grant full and immediate enforcement to the arbitration agreement, regardless of whether or not it refers to future or present controversies. The arbitration laws that still require the submission agreement are deemed to be outmoded and should be revised in order to make their provisions congruent with the modern trends on international arbitration.

1.3 Enforcement of an arbitration agreement under theUNCITRAL Model Law and the New York Convention

The Model Law defines the arbitration agreement as:

"An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not" .

According to the New York Convention," Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractua1 or not, concerning a subject matter capable of settlement by arbitration" .

Concerning the enforcement of an arbitration agreement, the Model Law establishes that:

"(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2)Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court". Article 8.1 of the Model Law mostly follows the text of Article II.3 of the New York Convention.4However; the provision of the Model Law is more specific, since it establishes that the request must be made "not later than when submitting his first statement on the substance of the dispute". The Convention, on the other hand, does not say when the petition must be made. As explained above (see 1.2.1), the decision to decline jurisdiction and refer the parties to the arbitration proceedings they have agreed upon is not automatic, but must be requested by the interested party. This is so because the obligatory nature of the arbitration agreement derives from the parties' will. They may agree to submit their disputes to a court decision even after having previously agreed to enter into arbitration. We shall see later (infra4.1) that this agreement may occur tacitly if one of the parties brings an action before a court and the other does not raise the arbitration agreement as defense to prevent the court from intervening. Article II.3 of the New York

Convention, as well as article 8.1. Of the Model Law, is mandatory. When the appropriate conditions for its application are met, the court is obliged to refer the dispute to arbitration. This means that the court must not intervene (i.e. it must decline its jurisdiction). It is the law governing the judicial proceeding that will determine whether an appeal can be made to the court's decision to admit the defendant's request and refer the case to arbitration, or to retain its jurisdiction on the grounds that the arbitration agreement is null and void, inoperative or incapable of being performed.

The Model Law (article 8.2) provides that while this question is being addressed in court, arbitral proceedings may nevertheless be commenced or continued. What is more, the law even empowers the arbitral tribunal to render an award. This rule is meant to protect arbitration from dilatory tactics, thus preventing the mere filing of a legal action from postponing the commencement of the arbitration process while the issue is pending before a court.4"The court of a Contracting *State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".*

1.3.1Competence of the arbitral tribunal to rule on its own jurisdiction

According to Model Law article 16 the respondent may raise the defence in the arbitral tribunal that the tribunal has no jurisdiction. This may happen after the court has found that the arbitration agreement was not "null and void, inoperative or incapable of being performed" pursuant to Model Law article8.2. It more often arises because the arbitration has commenced prior to any action in court. The issue may even arise during the course of the arbitration if one of the parties alleges that the arbitral tribunal is exceeding the scope of its authority. The grounds for the plea of lack of jurisdiction may be similar to those in article 8.2, but they may also be based on the argument that the claim put forth by the claimant is not comprehended by the arbitration agreement. The defence must be raised not later than the submission of the statement of defence or as soon as the matter alleged to be beyond the scope of the tribunal's authority is raised during the arbitral proceedings. The court always has the last word, however. If no appeal to the court from a decision of the arbitral tribunal recognizing its own jurisdiction is permissible during the course of the arbitration, the courts of the place of arbitration would have the authority to set aside the eventual award. Furthermore, the

court asked to enforce the award would be authorized under the New York Convention, article V(1)(c) to refuse enforcement of an award that "The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, ..." The latter two possibilities would mean that the parties would have had to spend considerable time, effort and money before a court were in a position to rule on the jurisdiction of the arbitral tribunal. On the other hand, if an appeal to the courts from the decision of the arbitral tribunal recognizing its own jurisdiction is permitted immediately, there is the risk that the respondent will appeal for the sake of delaying the arbitration. The position taken in the Model Law, article 16(3) is that "if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may [appeal to the court], within thirty days after having received notice of the ruling, ..."While the matter is pending in the court, the arbitral tribunal may continue the arbitral proceedings. The decision of the court is subject to no appeal. The combination of the provisions of articles 8 and 16 restricts the court's role in determining whether the arbitration clause is null and void. Any determination of the arbitrator's jurisdiction is made by the arbitrator pursuant to article 16.

Summary

In order to determine the enforcement of the arbitration agreement, we need to look at the requirements laid down by the applicable law.

If the applicable law is one of the modern arbitration laws based upon the Model Law, the parties will not need to sign a new agreement later, and the arbitration clause may set the arbitration proceedings in motion. If, on the contrary, the applicable law requires that a submission agreement be signed even if there is a previous arbitration clause, it is necessary to see what the requirements for this new agreement are and how it can be executed incase one of the parties refuses to cooperate.

Section two

2. THE LAW APPLICABLE TO THE ARBITRATIONAGREEMENT

On the completion of this section, you will be able to:

- *Classify the most common criteria for determining the law applicable to the arbitration agreement;*

- *Identify the predominant criterion under the Model Law;*

• Compare the Model Law's main criterion with the one governing the New York Convention;

• Answer the question whether the New York Convention contains any choice-of-law directive to govern the issue at the award enforcement stage?

2.1 ***Criteria for determining the law applicable to the arbitration agreement***

The law applicable to the arbitration agreement governs the formation, validity, enforcement and termination of the arbitration agreement.

It deals with such aspects as the formal requirements of the arbitration agreement, the arbitrability its subject matter, its autonomy in relation to the contract in which it is contained, the arbitrators' capacity to rule on their own jurisdiction and the extent to which judicial review is admissible. The applicable law also determines whether or not the submission agreement is required. There are different criteria for determining the law applicable to the arbitration agreement. We shall focus on the most common ones:

•The law chosen by the parties

Some laws allow the parties to choose the law applicable to the arbitration agreement, irrespective of the law governing other question relating to the arbitration.

•The law applicable to the contract

Some authors claim that the law applicable to the arbitration agreement is usually the law applicable to the contract that contains the clause.

These authors nevertheless admit that the law applicable to the agreement could be different, since the arbitration agreement is separable from the main contract (see Chapter 5).

•The procedural law applicable to the arbitration

Another criterion consists of applying to the arbitration agreement the procedural law that governs the arbitration. As shall be discussed (infra6.4.7 and 6.4.8), in the absence of an agreement the procedural law is in principle the law of the place of arbitration.

Although rare in practice, The parties have the right to choose a procedural law other than the law of the place of arbitration.

•The law of the place of the arbitration

Parties seldom indicate either a special law applicable to the arbitration agreement or a specific procedural law. Consequently, the place of arbitration becomes important because it will then determine the law applicable to the arbitration agreement (see infra 6.4.7 and 6.4.8).

2.2 The Model Law

In this connection, the Model Law does not contain rules of choice of law to determine the law applicable to the arbitration agreement.

When adopted by any country, the issue of the applicable law is solved, because the Model Law sets forth the validity requirements for an arbitration agreement providing for international commercial arbitration in that State.

2.3 The New York Convention

The New York Convention adopts, to a greater extent than does the Model Law, the principle that the parties are free to determine a law different from the law of the place of arbitration as the law applicable to the arbitration agreement. The question of the existence and validity of the arbitration agreement may arise in two different situations:

a) Initially, when one of the parties requests a court to recognize the arbitration agreement (for instance, by requesting the court to decline its jurisdiction or to appoint an arbitrator); or

b) At the end of the arbitration, when it is raised as a defense to challenge recognition or enforcement of the arbitral award. The New York Convention provides rules of conflicts of law for this last situation, but is silent about the first case. When a dispute regarding the existence or validity of the arbitration agreement arises at the stage of enforcing an award, Article V.1 provides that "recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the

law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."...

Under this provision, the parties are free to determine the rules to which they submit the validity and scope of the arbitration agreement. The parties' freewill in this sense, however, is not unlimited, since it is generally required that the rule of law chosen must have some connection with some of the elements (the legal transaction or the controversy).

If nothing has been agreed upon by the parties, the Convention refers to the local rules of the country where the award was made. Thus, the determination of the place of arbitration becomes particularly important inasmuch as the award is considered made at that place(see infra, 6.4.7).For the situation described in a) above, Article II.3 of the Convention establishes:

"The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed". As article II does not contain any choice-of-law directive, as does article V.1.a, opinions by commentators on the Convention vary:

•For some, the same choice-of-law rules that govern at the award-enforcement stage under article V should apply as well at the earlier agreement enforcement stage under article II.

•For others, an autonomous interpretation of article II is possible. What is meant by autonomous interpretation?

•The formal requirements for the validity of an arbitration agreement, laid down in article II.2, should supersede national law.

•As the applicable law is not indicated, courts may under this wording be allowed some latitude: they may find an agreement incapable of performance if it offends the law or the public policy of the forum.

•The standards that the Convention intends to establish for determining enforcement or arbitral agreements are international standards.

2.4 Summary

The law applicable to the arbitration agreement is defined as the law governing the questions relating to the formation, validity, enforcement and termination of the arbitration agreement. Broadly speaking, the parties may choose the law specifically applicable to the agreement. Otherwise, the most common criteria are: the law applicable to the contract containing the clause; the procedural law applicable to the arbitration; or the substantive law chosen by the parties or determined as applicable to settle the conflict. Under the New York Convention, the validity of the arbitration agreement is, in the first place, subject to the law chosen by the parties. Otherwise, the law of the place of arbitration shall apply. This solution, clearly established when recognition or enforcement of an award is requested in court, may also reasonably be applied when the question is raised at the moment of requesting recognition of the arbitration agreement in court.

Section three

3. REQUIREMENTS FOR THE ARBITRATIONAGREEMENT

On the completion of this section, you will be able to:

• Identify the most common general principles to consider an arbitration agreement valid;

• Examine the validity of an arbitration agreement that submits to arbitration "all the legal relationships between the parties";

• Identify the rules for determining the capacity of the parties to agree to submit to arbitration;

• Explain the meaning of "agreement in writing" under the Model Law and the New York Convention;

• Answer or address the following questions:

• What matters can be arbitrated?

• How is the "arbitrability" of the matter submitted to arbitration determined? In order to determine the validity requirements for an arbitration agreement, account should be taken of the specific conditions required by the applicable law. This is important, as the invalidity of an arbitration agreement is one of the grounds for requesting the setting aside of an arbitral award or challenging its enforcement.

Notwithstanding other specific requirements laid down by specific legislation, the most common are the ones described in this section.

3.1 It must arise out of mutual consent

The parties' consent is the basic requirement for the arbitration agreement. Their intention to submit to arbitration must unequivocally arise from the agreement. The New York Convention (article II.1) requires that in their agreement the parties "undertake to submit to arbitration" their disputes. This expression means that:

•The agreement must contain a mandatory, rather than permissive, undertaking, and

•The agreement must provide for arbitration, rather than another process of dispute resolution. The agreement must have originated from the parties' free will. Therefore, if one of them has acted induced by error or as a consequence of fraud, coercion or undue influence, there has been no real consent and the agreement to arbitrate not valid.

3.2 The parties must have legal capacity

3.2.1Consequences of the lack of capacity

The parties' lack of capacity to submit to arbitration entails the invalidity of the arbitration agreement. Broadly speaking, the manifestation of will by a party who is not legally entitled to assume obligations has no legal effects. Capacity is one of the general requirements to enter into any agreement. The arbitration agreement is subjected to the same rules applicable to the validity of contracts in general, which means that the lack of capacity usually makes the whole act void. If the arbitration agreement is invalid or null and void, this could be declared in the following stages:

- *•When discussing the enforceability of the arbitration agreement: Article 8.1, Model Law:*

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed".

Article II.3, New York Convention:

"The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

- *When the arbitral award is challenged by a party in set aside proceedings:*

Article 34, Model Law: "(2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State…".

- *When the enforceability or recognition of the arbitral award is claimed by a party:*

Article 36, Model Law: "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."…

Article V, New York Convention: "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made…".

3.2.2Law applicable to the legal capacity

The New York Convention establishes that the parties' capacity is governed by the "the law applicable to them" (article V.I.a). This concept does not appear in the Model Law. There is no uniform understanding concerning the law applicable to the legal capacity of individuals. It will depend on the system of conflicts of law of the forum called to consider the arbitration agreement. The prevailing criterion is that legal capacity should be governed by the personal law of each party. This, in turn, opens a new range of possibilities since that "personal law" maybe the one governing either the parties' nationality or their domicile.

3.2.3The legal capacity to enter into an arbitration agreement

Laws usually contain specific provisions on the capacity of the parties to an arbitration agreement. In domestic arbitration, the question has to do with the capacity of the parties to carry out business transactions (Argentina: article738, Procedural Code; Ecuador: article 4, Arbitration Law of 1997); or to compromise (Belgium: article 1676, Judicial Code, amended 1998); or to dispose of assets (France, article 2059, Civil Code). In international arbitration the most common problems related to the issue of legal capacity are those referred to the ability to act on behalf of legal entities (usually corporations or governments) by the persons who execute the arbitration agreement. The provisions of the laws vary: some require that the signatory agent be entrusted with special proxy to submit to arbitration (Argentina: article 1882, Civil Code); while in others the arbitration agreement is subject to the same requirements as those to enter into the agreement that is the subject matter of the arbitration(Belgium, article 1676, Judicial Code).

3.3 The agreement must be made in writing

Both the Model Law and the New York Convention require that the agreement be made "in writing". However, the notion of "in writing" is broad and includes situations in which the agreement has not been printed on paper and signed by the parties.

The New York Convention provides that" The term 'agreement in writing' shall include an arbitral clause in a contractor an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams" (article II.2).

The Model Law is even more precise:

" An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of

telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.

The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract" (article 7.2).It is worth making a brief analysis of some specific situations.

3.3.1 Must the agreement be contained in the same document? *According to the New York Convention, the term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams (article II.2).*

Following a similar rule, the Model Law defines that" An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement..." (Article 7.2).

3.3.2 Are signatures necessary for the validity of an arbitration agreement?

The Model Law and the New York Convention require that the agreement be signed. Some commentators have considered this circumstance as a disadvantage in relation to more modern laws that do not consider the signature a validity requirement. For example, the English Arbitration Act (1996) states that there is an agreement in writing if the agreement is made in writing, whether or not it is signed by the parties (section 5.2.a). Without the signature, however, it may be more difficult to prove that the party against whom it is invoked consented to it.

The Model Law provision was nevertheless understood as having a wide meaning. CASE LAW: High Court of Hong Kong, July 30, 1992, Pacific International Lines (PTE) Ltd. & Another v.Tsinlien Metals and Minerals Co. Ltd. The plaintiff, owner and manager of a vessel chartered to the defendant, sought payment of damages for breach of the charter-party. The plaintiff appointed an arbitrator pursuant to an arbitration clause contained in the charter-party. The defendant failed to appoint a second arbitrator and the plaintiff applied in accordance with article 11(4) of the Model Law for the court to appoint a second arbitrator. Although the charter-party was not signed by both parties, the court found that there was a charter-party between the plaintiff and the defendant, since there

was no doubt from the facts and the pre-voyage communications that the defendant had chartered the vessel of the plaintiff and had paid also certain sums to the plaintiff in accordance with that charter-party. The court concluded that article 7 of the Model Law requiring a written agreement to arbitrate had been complied with and gave the defendants even days to appoint a second arbitrator; otherwise the court would appoint him.

Moreover, the signature requirement is not as obsolete as it may seem if it is interpreted together with others set forth by UNCITRAL. Specifically, we are referring to the UNCITRAL Model Law on Electronic Signatures (2001). Its article 6 states:

1. Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

2. Paragraph 1 applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

3. An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph 1 if:

(a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;(b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

(c) Any alteration to the electronic signature, made after the time of signing, is detectable;

And (d) where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing isdetectable.4.Paragraph 3 does not limit the ability of any person:

(a) To establish in any other way, for the purpose of satisfying the requirement referred to in paragraph 1, the reliability of an electronic signature; or(b) To adduce evidence of the non-reliability of an electronic signature. Article 2 defines "Electronic signature" as data in electronic form in, affixed to or logically associated with, a data message, which

may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message. Accordingly, then, even though the Model Law on Arbitration sets out the signature requirement, its interpretation in the context of the UNCITRAL model provisions makes it possible to significantly broaden the concept of" signature" for the purposes of the arbitration agreement. It is important to point out that the Working Group II of UNCITRAL has been working to update this rule. There is general agreement that the writing requirement as it is currently drafted in the Model Law, but more importantly in the New York Convention, reflects a distrust of arbitration that was common in 1958 when the New York Convention was adopted that is no longer appropriate at a time when international commercial arbitration has become the preferred mode of international dispute resolution. There is, however, alack of consensus as to how far it would be appropriate to go in admitting various techniques for showing that an agreement to arbitrate had been concluded. A more difficult problem is whether the Model Law should recognize arbitration agreements that would probably not qualify as written arbitration agreements under the most widely accepted interpretations of the New York Convention. As a result of these conceptual and practical difficulties, at its Thirty-fifth session the Commission considered that time should be given for consultations before the matter was taken up again. As of the time of writing, the Working Group has not been able to return to the subject.

3.3.3 Is a tacit consent to arbitration valid?

There is also general consensus that the arbitration agreement arises from the exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. This principle, expressly recognized in some laws, is based on the general legal principle

Whereby consent can be validly assumed when a party "does what he would not have done, or does not do what he would have done if he did not intend to accept the proposal." The plaintiff's decision to submit the case to arbitration, consented to by the defendant, may validly be considered a tacit agreement to arbitrate. The Model Law mentions, as equivalent to "written agreement", an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and is not denied by another. This is not the position under the New York Convention. Such omission makes it doubtful whether awards made in arbitration proceedings born in this way could be recognized under the

New York Convention, since they do not strictly comply with the requirements set out by article II of the Convention.

3.3.4Can arbitration be agreed upon "by reference"?

The Model Law admits a third form equivalent to a written arbitration agreement: the reference in a contract to a document containing an arbitration clause, provided that the contract is in writing and the reference is such as to make that clause part of the contract. The provision does not require the existence of a specific reference to the arbitration clause. If the other two requirements are fulfilled (i.e., the contract has been made in writing and the reference unequivocally states that the clause is part of it), it is enough for the clause to make a general reference to the document.

3.3.5Summary

Almost all arbitration laws require that the agreement be in writing. However, not all laws give this content the same scope. This is why the formal requirement defined as "in writing" should be complied with in accordance with the specific provisions of the applicable law. The most widespread criteria consider that the written form requirement maybe met in several ways:

•If the agreement is contained in a single document written on paper and signed by the parties;

•If it is contained in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement;

•If it is contained in an exchange of submissions or statements of claim and defence (in arbitration or court proceedings) in which the existence of an agreement is alleged by one party and not denied by the other;

•If there is a reference in a contract to a document containing an arbitration clause, provided that the contract is in writing and the reference is such as to make that clause part of the contract؛

•If the agreement is evidenced in writing, which includes the record by one of the parties or by a third party, with the authority of the parties to the agreement;

•If the parties agree otherwise than in writing by reference to terms that is in writing.

3.4 It must arise out of a defined legal relationship

Both the New York Convention (article II.1.) and the Model Law (article7.1.) establish that the arbitration agreement must refer to differences which have arisen or which may arise between them in respect of a defined legal relationship, whether or not contractual. In addition to those generic requirements, the arbitration agreement must refer to a concrete and specific legal relationship between the parties. The parties must have a legal link, which has given or may give rise to the controversies submitted to arbitration. Although this legal relationship will most frequently be of a contractual nature, it may well be non-contractual, provided that it can be identified and delimited. An arbitration agreement written in terms too ambiguous or generic, which does not restrict its scope to the disputes arising from a particular juridical relation, would not be acceptable. For instance, the parties could not agree to submit to arbitration "any dispute that could arise between them." Such clause could be questionable, as it would entail waiving the court's jurisdiction in too generic and indiscriminate terms.

3.5 The subject matter must be arbitrable

The disputes submitted to arbitration by the parties under an arbitration agreement must be "arbitrable." The concept of arbitrability is related to the nature of the disputed rights. Arbitration, as has been said, is a dispute resolution system arising out of an agreement whereby the parties confer upon the arbitrators the function of administering justice. Individuals that are not public officers, provided that their intervention is related to rights that do not affect public or general interests, can exercise this task, in principle performed by the judiciary. The possibility of choosing how to exercise a right means that the parties can waive it or agree on its use. As a consequence of that character, it is agreed that conflicts referring to such rights may be settled by these "private judges" (arbitrators) who do not belong to the judiciary. The Model Law does not directly lay out the requirement for arbitrability. This requirement is nevertheless not unfamiliar to the Model Law, which indirectly incorporates it in two ways:

a) In defining its field of application, the Model Law establishes that it shall not affect any other domestic law by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law (article 1.5); and

b) If the subject matter on which the arbitrators made the award was

not arbitrable, that would be a ground for requesting the setting aside of the award or for rejecting its recognition or enforcement (article 34.b.iand article 36.b.i). What was decided in the Working Group was not to attempt either to list non-arbitrable subject matters in the Model Law or to require each state to do so when adopting the Law.

Unlike the Model Law, the New York Convention expressly sets out that the content of the agreement must be "concerning a subject matter capable of settlement by arbitration" (article II.1). Apart from this general rule, the New York Convention includes arbitrability of the subject matter as a requirement whose omission precludes recognition or enforcement of the award, in similar terms to those of the Model Law (Article V.2.a).In international arbitration, the question as to whether a dispute is arbitrable arises most often in regard to such matters as antitrust, securities exchange or disputes involving other statutes expressing a strong public policy. Disputes involving those matters had traditionally been considered to lie outside the scope of arbitration. During the last fifteen years, however, there have been decisions in different courts that have ruled in favour of arbitrability. The Supreme Court of the United States stated that while arbitration focuses on specific disputes between the parties involved, so does judicial resolution of claims, yet both can further broader social purposes. Various laws, including antitrust and securities laws and the civil provisions of the Racketeer Influenced and Corrupt Organization Act, are designed to advance important public policies, but claims under them are appropriate for arbitration.

In regard to antitrust issues, there is now a consistent case law acknowledging its arbitrability. Some examples illustrate this development.

Section 4

4-TERMINATION OF THE ARBITRATION AGREEMENT

On the completion of this section, you will be able to:

- *Classify the different ways of terminating an arbitration agreement*
- *Answer or address the following questions:*

• Is the right to go to arbitration waived if one of the parties submits to a court's decision matters that are referred to in an arbitration agreement as being within its scope?

• What other grounds for termination of the arbitration agreement are usually provided by domestic laws on arbitration?

4.1 Termination of the arbitration agreement by mutual consent

Just as arbitration arises out of an agreement, the parties may terminate it by mutual consent. This new agreement can be express or tacit. It is express when the new agreement between the parties is executed in accordance with the provisions previously agreed upon. Implied waiver operates when one of the parties files a lawsuit about matters contained in the arbitration agreement, and the other does not timely object to the court's lack of jurisdiction. As an example, the Spanish arbitration law provides that the arbitration agreement shall be deemed discharged if a complaint is filed and the defendant does not raise lack of jurisdiction as a defence (art. 11.2).

4.2 Other possible grounds for termination

4.2.1Grounds related to the parties the death of one of the parties does not, as a rule, cause the termination of the arbitration agreement. Under legal systems that adopt the principle of universal succession, the mortis cause successor to a person inherits all the rights and duties of the deceased, except those that could have only been exercised or performed personally (intuitu personae). However, this is a question to be solved under the applicable law: Prior to the year 2000 the Paraguayan Procedural Code (article 793)provided that if one of the parties died before the rendering of the award, the arbitration proceeding would be terminated and the parties or their successors could go to court.

By contrast, Section 8 of the English Arbitration Act states :"(1) unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party. (2)Subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death." With respect to legal entities, other examples of universal succession could be mergers and acquisitions, liquidation or general bankruptcy. In general, mergers, acquisitions or liquidations will bear no impact to the arbitration agreement. The universal successor will be bound by the arbitration agreement. Bankruptcy proceedings are issues resolved by domestic

legislations and generally they cannot be displaced by private agreements. The legislation of each country will determine the impact of bankruptcy on the arbitration agreement. In Argentina, for example, the Bankruptcy Law provides that arbitration proceedings may continue even if one of the parties is declared in bankruptcy where the arbitration tribunal has already been appointed.

4.2.2 Grounds related to the arbitrator

The death of the arbitrator is not a ground for termination of the arbitration agreement, either. Again, although we should analyze the provisions of the applicable law, the common solution is to replace the arbitrator. Thus:

- *Section 26.2 of the English Arbitration Act provides that the authority of an arbitrator is personal and ceases on his death. Section 27 provides the way to fill the vacancy. In that case, the parties are free to agree whether and, if so, how the vacancy is to be filled. If there is no such agreement, the provisions of sections 16 (procedure for appointment of arbitrators) and 18 (failure of appointment procedure) apply in relation to the filling of the vacancy as in relation to an original appointment.*

- *The Brazilian law provides that the submission agreement is extinguished when one of the arbitrators dies or he cannot render his vote, provided that the parties have expressly declared that they will not accept substitutes (article 12). The Portuguese law has a similar provision (article 3).*

4.3 Summary

The arbitration agreement may be terminated by the parties who made it by means of a new stipulation. This stipulation may be express or implied. This last form of discharge operates when one of the parties files a complaint about matters contained in the arbitration agreement, and the other does not raise lack of jurisdiction as a defence at the right time in the process. Apart from this ground, the laws provide other grounds for termination of the arbitration agreement:

- *Although the death of one of the parties is not generally considered aground for termination of the agreement, it is expressly provided for under some laws.*

- *The death of the arbitrators is not normally a ground for terminating the arbitration agreement, either. Some laws set forth otherwise when the*

parties regard the intervention of a specific arbitrator as a condition for the arbitration.

Section 5

SEPARABILITY OR AUTONOMY OF THEARBITRATION AGREEMENT

On the completion of this section, you will be able to:

• *Describe and compare the concepts of "separability of the arbitration agreement" and "Kompetenz-Kompetenz";*

• *Identify the cases in which both principles are applied;*

• *Solve the question of whether arbitrators must decline their jurisdiction and refer the case to a judicial court when their jurisdiction is challenged on the grounds of invalidity of the arbitration agreement.*

5.1 The problem and its solution

Historically, it was held that an arbitration agreement contained in a contract was accessory to the main contract and that the invalidity of the contract also entailed the invalidity of the arbitration agreement. On the basis of that interpretation, arbitral jurisdiction was frequently restricted by challenges to the validity of the contract, since those challenges involved the arbitrators' jurisdiction as well.

The argumentative line was as follows:

•*If the main contract is null and void, so is the arbitration agreement that is accessory to it;*

•*If the arbitration agreement is considered null and void, arbitrator slack jurisdiction to solve any of the question relating to such contract, including whether the contract is invalid or not;*

•*As the validity of the arbitration agreement is being questioned, arbitrators must not intervene until a court decides the matter. In this way, the mere filing of such a defence would entail an obstacle to arbitration. In order to avoid that situation, most laws and regulations on arbitration have included two very important principles:*

•*"Separability", "autonomy" or "independence" of the arbitration clause; and*

•"Kompetenz-Kompetenz" or "competence de la competence". The two principles mentioned refer to different situations. The "Kompetenz-Kompetenz" principle aims at giving arbitrators the possibility to examine and decide in first instance on any objection to their jurisdiction. According to the principle of "separability of the arbitration clause", if the arbitrators decide,

Within the scope of their jurisdiction, that the contract containing the arbitration clause is null and void, that does not entail the loss of their jurisdiction. In practice, however, the two principles complement one another, since the contentions are usually made at the same time. The invalidity of the contract, the invalidity of the arbitration agreement and the consequent lack of jurisdiction of arbitrators are often part of a common defense strategy. The principles described have been upheld by the authors, accepted in case law and recognized by statutes. Their purpose is to enable arbitrators to retain jurisdiction and solve the disputes, even those related to the validity or invalidity of the contract. Otherwise, the mere contention of invalidity of the contract would imply neutralizing the effects of the arbitration agreement. This would, in turn, mean invalidating the method chosen by the parties to settle the conflict. The ultimate argument of these provisions is that the arbitration clause is not just another clause within a contract. Its special purpose –to confer jurisdiction upon those who must solve the differences arising under the contract– entails empowering arbitrators to rule on all questions related to the contract, even those relating to their own jurisdiction. There are also other reasons behind these rules. The possibility of removing the arbitrators by just raising a plea that the contract is invalid would constitute a simple way of avoiding arbitration. If the matter of the arbitrator's jurisdiction was dependant on a previous court decision on the validity of the contract, arbitrators' intervention could easily be avoided. This would entail disregarding the original common intention of the parties to submit conflicts arising out of the contract to arbitration. Although these principles are widely accepted, recourse to the courts is usually provided to review the arbitrators ruling on competence, either through a direct right to review (when the issue of competence was subject to a previous partial award) or at the stage of setting aside the award (when the issue was part of the final award).

5.2 The UNCITRAL Model Law

Article 16 of the Model Law upholds these two principles when it says :"(1) the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the

arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.(2)A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not

Precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.(3)The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award." As can be seen, this rule does not confer upon arbitrators full powers to rule on the contention of lack of jurisdiction. They are allowed to decide this matter initially, as a way of preventing the mere raising of the plea from causing their removal. By examining the background to the case, the arbitral tribunal may decide to what an extent the defenses raised by the parties are legally effective. In the meantime, however, the arbitration clause must be considered valid in order to allow arbitrators to rule on its existence, validity or duration.

5.3 Summary

Historically, it used to be interpreted that when the arbitration agreement was in the form of a clause contained in a contract, the clause was accessory to the contract. It was thus concluded that the invalidity of the contract also entailed the invalidity of the arbitration agreement. On the basis of that interpretation, whenever a party pleaded invalidity of the main contract and perforce of the arbitration agreement, thereby challenging the arbitrators' jurisdiction, the arbitrators were obliged to suspend the arbitration proceedings until the question was decided by a court. In order to avoid this situation, most modern laws and rules on arbitration have included two main principles: the principle of "separability", "autonomy" or "independence" of the arbitration clause,

and that of "Kompetenz-Kompetenz" or "competence de la competence". Since the arbitration agreement is currently regarded as autonomous or separate from the main contract, the invalidity of the contract does not entail the automatic invalidity of the arbitration agreement. Moreover, as arbitrators are empowered to examine and rule on pleas raised against their jurisdiction, the arbitration is not terminated or suspended by the mere raising of a motion that the arbitrators lack jurisdiction.

The Model Law expressly incorporates these two principles. However, it must be noted that even though the principle of Kompetenz-Kompetenz empowers arbitrators to initially decide the plea for lack of jurisdiction, their decision is subject to subsequent judicial review.

Section 6

6. GUIDELINES TO DRAFT AN ARBITRATIONAGREEMENT

On the completion of this section, you will be able to:

• Assess when it is advisable to agree on arbitration proceedings to resolve future disputes and when we should wait until disputes actually arise;

• Identify the key words to use when drafting an arbitration clause;

• Assess when it is convenient to agree either on ad hocor institutional arbitration;

• Identify and recognize the relevant elements in selecting the arbitral institution;

• Analyze the different mechanisms for the appointment of arbitrators;

• Explain why it is important to agree on the place of arbitration;

• Answer or address the following questions:

• May the parties agree on the application of a procedural law other than that of the place of arbitration?

• Why is it important to agree on the language applicable to the arbitration proceedings?

• Describe the most usual ways of determining the applicable substantive law in the absence of any contractual provisions;

• *Analyze when and how arbitration ex aequo et bono may be agreed upon;*

• *Determine if and when the parties may waive recourses against the award. In this section, we shall provide some guidelines on the questions to take into account when drafting an arbitration agreement.*

6.1 When to resort to arbitration

Although the ideal situation may be to agree on arbitration when there is a concrete controversy between the parties, that situation is far from common. Usually, once the conflict has broken out, the parties do not agree on whether or not to resort to arbitration or on the procedure to be followed. The only way of securing arbitration is to make the necessary provisions before conflicts arise. In other words, if arbitration is not agreed upon a priori to settle future differences, the parties will probably not be able to profit from the possibility of arbitrating their dispute once it arises.

6.2 General considerations: written form of the arbitration clause and words to use

In order to agree on arbitration in advance to settle controversies that have not arisen yet, it is necessary to carefully analyze the terms that must appear in the arbitration agreement. The first necessary, although obvious, clarification to make is that the parties must unequivocally express their intention to resort to arbitration. The agreement must contain a mandatory, rather than permissive, undertaking to arbitrate. Instead of using verbs such as "May" or "might" the parties should use more compulsory ones: "shall" or "must". Ambiguous or equivocal expressions must be avoided. In a case in which the parties had agreed that" In case of necessity, the ICC Paris shall be called upon", for example, the International Court of Arbitration of the International Chamber of Commerce held that the clause was not an arbitration clause.28The arbitration agreement must be written in such a way as not to make it necessary to complete it or complement it when the conflict arises. The arbitration clause must be clear, complete and autonomous. However, this does not mean that it must be in complex terms or too long. It is best to use standard words that do not lead to confusion as to the parties' intention. Ambiguity is the worst enemy of an arbitration clause, not only because it may entail the ineffectiveness of the agreement, but also because it will cause unwanted complications in the proceedings and may give the opposing party a powerful weapon to challenge its enforcement in court, thus neutralizing the advantages of arbitration.

6.3 How to define the subject-matter to be submitted to arbitration

A significant aspect to consider is the determination of arbitrable questions. It's advisable to avoid language that may restrict the scope of the agreement. If the clause is ambiguous and allows several interpretations, the party interested in resisting arbitration may contend the non-arbitrability of a specific controversy. This will eventually lead to an action before a court, that will cost both time and money, and, possibly, to a court decision excluding certain questions from the arbitration. Clauses submitting to arbitration disputes relating to "the performance, breach, termination, validity, formation, interpretation or enforcement of the contract" must be avoided. They involve the risk that the conflict might not be literally included in that listing, and a court might consider such enumeration to be of a restrictive nature, since for many courts arbitration clauses must be subject

to a restrictive interpretation as they entail a waiver of the constitutional right to resort to the courts. To indicate the subject matter submitted to arbitration, it is also advisable to avoid words that may have a narrow or more specific meaning, such as "claims." It is recommendable to use the terms "differences" or "disputes", because they mean more than the existence of a claim. Expressions such as "in connection with" or "in relation to", are given a broad meaning and have been held to include claims for rectification of a contract, as well as issues of mistake and misrepresentation. Similarly, such phrases as" arising out of the contract" have a wide meaning and have been said to have wider meaning than "arising under a contract", as the latter have been said not to cover rectification claims. Adjectives should also be avoided that qualify the disputes submitted to arbitration. Professor Gray tells the case of a clause that stated: "if any question of fact shall arise under this contract... either party hereto may demand arbitration..." A dispute related to this contract arose when a party sued the other for breach of contract. The defendant asked the court to refer the parties to arbitration, according to the arbitration clause. The court so ordered. The arbitrators rendered an award, ordering the defendant to pay an amount of money. The motion to vacate the award was denied. On appeal, the Second Circuit ruled that the parties clearly did not intend to submit this question to arbitration. The narrow language used to agree to arbitration did not cover the issue decided by the arbitrators, which involved questions of law as well as fact. The appellate court accordingly held that the arbitrators had exceeded their authority. Naturally, this recommendation is valid provided that the parties wish to submit to arbitration "all" disputes arising out of that legal relationship. If the parties want to

submit only some of them to arbitration, they must designate them clearly to avoid misunderstanding. For example, in a supply contract, the parties may agree on one kind of arbitration to settle "all differences concerning the quality of goods." Even though in this way the arbitrable questions would be covered, problems may all the same arise if the conflict involved questions submitted to arbitration together with others that were not. For example, if the buyer refused to pay the price, alleging that the goods delivered did not meet the quality requirements agreed on, it is doubtful that the seller could commence arbitration under this clause to recover the purchase price. It may be concluded, then, that if the parties want to submit to arbitration all disputes relating to a contract, the use of a comprehensive clause is recommendable. The UNCITRAL Model Arbitration Clause states: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in

Accordance with the UNCITRAL Arbitration Rules as at present in force". This phrase has been regarded as broad and it comprises all kind of disputes.

6.4 Specific questions to take into account

Apart from the general questions mentioned above, there are some specific ones to be considered when drafting an arbitration agreement. Once they have decided to settle their disputes by arbitration, it is not advisable for the parties merely to agree that "All differences arising out of or in connection with this contract shall be settled by arbitration". Such an agreement would be perfectly valid in most countries, in that it complies with the minimum requirements established by most laws. However, it would not make a good arbitration agreement, because it would leave out many aspects, which could eventually end up calling for judicial intervention to fill the gap left by theparties.6.4.1Institutional or ad hoc arbitration? When the parties decide to submit their disputes to arbitration, they may choose between two types of proceedings:

Ad hoc arbitration or institutional arbitration (also known as "administered arbitration").In ad hoc arbitration, it is the parties themselves who, in the absence of the assistance of an arbitration institution, must choose the arbitrators or set up the mechanisms for their appointment. They should further agree on the place and language of arbitration, the applicable procedural rules, the arbitrators' fees, etc. The most effective way to provide for these matters is to use theUNCITRAL Model Arbitration Clause, which calls for arbitration under

theUNCITRAL Arbitration Rules. In institutional arbitration, there is an organization linking the arbitrators and the parties. Its role is, in general, to organize the arbitration proceedings. It provides services that are often very much appreciated by the parties; simplifying the tasks and helping them avoid problems. These organizations usually provide regulations that establish the arbitration proceedings; the procedures for the appointment, challenge and substitution of arbitrators; ethical rules that specify duties and responsibilities of arbitrators; arbitrators' fee scales, in order for the cost of arbitration to be predictable; clerical services, such as providing the place for the hearings, carry out the administrative work demanded by arbitration, receive the formal written allegations by the parties, serve notices ,etc. The decision to opt for one or another modality will depend on each particular situation. Ad hoc arbitration is most appropriate when there is an existing conflict. If chosen to settle future disputes, it may be difficult to commence the arbitration if one of the parties refuses to cooperate. The difficulties of ad hoc arbitration may, nevertheless, be substantially lessened by agreeing on theUNCITRAL Arbitration Rules and nominating an appointing authority.

6.4.2Selection of institutional arbitration

If the decision is for institutional arbitration, the following step is to determine the most advisable institution to conduct the arbitration. What are the criteria to choose an arbitration institution? What are the aspects to consider? Many institutions provide arbitration services. Each of them has special characteristics, which make them suitable for some cases and unsuitable for others. There are general arbitral institutions that offer their services in the general field of commercial issues; others that provide different arbitration models for different kinds of question (with rules and panels of arbitrators for each); others that only offer arbitration services concerning some specific matters .Apart from the prestige and trustworthiness of the organization, there are other elements to analyze before making the decision, namely: its set of rules, the list of arbitrators (or the method of their appointment) and costs. Before all this, the parties should define the nature of the disputes that may arise out of the contract in question. Knowing what kind of controversies may arise, the parties should naturally rule out the institutions that do not provide arbitration services for that kind of disputes. If the potential questions are too specific or involve technical or complex questions, it is also advisable to discard those institutions that are not experienced enough handling this type of controversy or that do not have appropriate rules and lists of arbitrators. It is essential to study the rules of the

prospective arbitral institutions. The purpose of the analysis is to determine, in the first place, if the procedure is suitable for the kind of conflicts that are likely to be arbitrated. As noted above, there are institutions that have a set of rules designed for a special category of issues and its provisions are suitable for such particular situation. If the conflicts that may arise out of the contract do not have those characteristics, such rules will probably be unsuitable. In any case, the parties should analyze the powers granted by the rules to the institution in the administration of the arbitration and to the arbitrators in the conduct of the proceedings; the rules of procedure (notice system, procedural terms, rules on evidence) and admissible means of recourse against awards. An aspect to consider is how arbitrators are appointed under the rules of the institutions. Do the parties have the right to choose arbitrators or is there a standing tribunal? Is there a list of arbitrators and is it mandatory that all the arbitrators, a sole arbitrator or the chairman be chosen from that list? Are there different lists according to the specific fields? Does the institution have discretionary power to choose arbitrators? In the event of a standing tribunal or a list of arbitrators, the analysis should be focused on the competence and experience of arbitrators in the type of questions likely to be arbitrated. If there is no list, the parties should analyze the competence of the organ of the institution in charge of appointing the arbitrators.

Last, but not least, comes the cost study. Arbitral institutions have scales that make it possible to foresee the cost of handling possible conflicts according to their amount. It is advisable to check the scale for the type of conflict that may arise between the parties. As was said in 5.2.6.2, the clause must be clear and understandable. In order to avoid interpretation problems when submitting a question to arbitration by a certain institution, it is preferable to use the model clause proposed by that institution. At most, if its set of rules contains provisions that the parties want to change, the parties may agree on some of them, provided they are authorized to do so by the rules. If there is any doubt, it is advisable to ask the relevant institution whether the intended derogation of the rules is authorized. The institution must be unequivocally mentioned in the clause. Unnecessary though it may seem, this recommendation is worth giving due consideration. There are frequently clauses in which disputes are submitted to an institution that does not exist as it is named. Since there are many with similar names, the parties must be careful and state the official name of the institution. We have seen clauses submitting dispute to the "Chamber of Commerce of Buenos Aires", an institution that does not exist. When one of the parties requested arbitration by the Argentine Chamber of Commerce (based in Buenos Aires),a controversy

arose concerning the submission to arbitration itself. In another case, it had been agreed to submit a question to an institution that did not have an arbitral regime in force. Courts ruled that in such case, the arbitration must be understood as not agreed upon and the conflict must be settled by a court. There are other examples of "pathological" clauses where the claimant requested arbitration by the International Chamber of Commerce but the arbitration clause provided for arbitration by the International Chamber of Commerce of Geneva, the Paris Chamber of Commerce, the Arbitration Court in Zurich, Paris Chamber of Arbitration, or the Arbitration Commission of the Paris Chamber of Commerce and Industry, none of which exist.32Ambiguous clauses like the ones mentioned are likely to raise doubts as to what institution the parties intended to submit their dispute. The first consequence of that ambiguity is that, at the time of the request for arbitration, there will almost certainly be a controversy between the parties that may end up in court. As a consequence, the institution might refuse to administer the arbitration alleging that its designation is not clearly established or some judge might find that, because the parties' intention to submit to arbitration itself is not clearly stated, the dispute must be settled by a court.

6.4.3Appointment of arbitrators

In ad hoc arbitration, it is essential to provide for the procedure by which the arbitrators are to be appointed. In this case, there is usually a clause whereby each party must appoint an arbitrator and these two arbitrators must designate the third one. In any case, it is important to provide supplementary mechanisms for the event that one party does not appoint its arbitrator or the two arbitrators cannot reach agreement on the third arbitrator. The parties may designate an appointing authority with powers to designate the missing arbitrator. It is best to designate an arbitral institution to perform this function. Arbitral institutions are often entrusted with the designation of arbitrators in ad hoc arbitrations even if the parties have not agreed to have the arbitration administered by it. The advantage of this procedure is that these institutions are accustomed to performing this task, have experience in the designation of arbitrators and even have lists of arbitrators from which to choose the more competent ones. The UNCITRAL Arbitration Rules specifically provides the mechanisms for designating arbitrators. Article 6 rules the case of the sole arbitrator; Article 7sets forth the designation mechanism when the parties have agreed on the intervention of three arbitrators; and Article 8 regulates the procedure to request the appointing authority to appoint the arbitrators. The UNCITRAL Arbitration Rules reasonably solve the

question of the appointment of arbitrators by the parties under articles 6(1) and 7(1). However, it is convenient to provide in the contract for an appointing authority accessible to the parties. There was a case in which the parties to a contract signed in Buenos Aires (Argentina) between an Argentine company and a Brazilian company agreed to submit to arbitration in Buenos Aires, in Spanish, under the UNCITRAL Rules and the Argentine law. However, they did not designate an appointing authority to appoint the arbitrators. No difficulty arose, since the parties appointed the arbitrators by mutual consent. Had it not been so, the omission would have led to a request to the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority, and then to a request to the appointing authority to appoint the arbitrators. This procedure would have entailed costs and delays detrimental to the arbitration, but the arbitration could at least have gone forward. In institutional arbitrations, the mechanism for appointing the arbitrators can all the same be agreed upon. The provisions contained in the rules for solving these questions are generally of a supplemental nature and are applied provided there has been no agreement by the parties to the contrary. The task of those drafting the arbitration agreement submitting to institutional arbitration is to check what the provisions are set forth in the rule and how possible it is to provide otherwise by express agreement.

6.4.4Number and qualifications of arbitrators

It is advisable for the parties to include in the arbitration agreement provisions concerning the number of arbitrators and, if possible, the qualifications or requirements to be met by them. In ad hoc arbitration, these specifications will avoid long discussions and possible legal actions. In the case of institutional arbitration, although the institution's rules contain solutions for the case of silence by the parties, such solutions will never be as good as those agreed upon by the parties. As regards the number of arbitrators, each institution, on the basis of its experience and the nature of the conflicts it normally administers, determines a priori whether it is preferable to have a sole arbitrator or an arbitral tribunal. Such a tribunal is almost always comprised of three arbitrators, although the parties are usually allowed to change this solution by express agreement. Assuming that the consensus between them does not always exist in the face of a real conflict, it is convenient to previously agree on it ensuring that the parties' common will is respected. The UNCITRAL Arbitration Rules establish that" If the parties have not previously agreed on the number of arbitrators (i.e.one or three), and if within fifteen days after the receipt by the respondent of the

notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed" (Article 5).It is only natural that, when agreeing on arbitration to settle future conflicts, the parties prefer not to name the arbitrators in the arbitration clause, since at that moment it is unknown whether conflicts will arise. The parties may nevertheless agree on the arbitrators' required qualifications. They may agree that arbitrators must be of a certain profession, nationality, specialized in specific areas, that is to say, on any condition that the parties may consider relevant for choosing the arbitrators. Indication of the conditions to be met by the arbitrators is as important in adhoc arbitration as it is in institutional arbitration. Faced with a conflict, the parties may find it difficult to agree on the appointment of the arbitrators. The appointment will then be made by a third party –a private appointing authority or a court– in charge of designating the arbitrators. Confronted with that contingency –the most probable one– the detailed provisions made by the parties in the arbitration clause concerning arbitrators' qualifications will restrict the margin of discretion of the third party. Whoever appoints the arbitrators must respect what has been agreed upon by the parties. The more closely things are defined; the more probability there will be that arbitrators so appointed will be similar to the ones the parties would have chosen.

6.4.5 Rules of procedure

In ad hoc arbitrations, the parties must create their procedures. These can be accomplished either by: laying down specific rules for that procedure or referring to a set of already existing rules. Even if the parties do not submit to arbitration administered by an institution, they may still incorporate its regulatory provisions by reference, which shall be followed by both the parties and the arbitrators. An example of a set of rules specially intended to be used by the parties in ad hoc arbitrations is the UNCITRAL Arbitration Rules. These rules contain a complete set of provisions concerning different questions related to the organization of arbitration proceedings, such as notice, calculation of periods of time (article 2); number of arbitrators (article 5); appointment of arbitrators(articles 6 to 8); challenge and replacement of arbitrators (articles 9 to 13);general provisions for arbitral proceedings (article 15); place of arbitration(article 16); language (article 17); evidence and hearings (articles 24 and 25);interim measures of protection (article 26);decisions (article 31); form and effect of the award (article 32); applicable law or amiable compositeur (article33); interpretation and correction of the award (articles 35 and 36); costs(articles 38 to 40).As Professor Gray puts it, these rules are widely regarded as very

satisfactory and have the added attraction of having been drafted with the participation of Third-World countries. In international arbitration, the parties are often reluctant to accept the administration of the arbitration or –in ad hoc arbitration– the reference to rules of institutions based in the country of one of them. The confidence inspired by a prestigious multilateral organization such as UNCITRAL makes these rules an attractive option in ad hoc arbitrations without having to agree upon every single condition for the arbitration. In institutional arbitration, the submission to arbitration implies the adoption of the rules of procedure of the institution in question. No set of rules provides for all the questions that may be put forward throughout an arbitration process. They generally contain solutions to the most common problems or situations, and leave a wide margin of discretion to the arbitrators to resolve the procedural questions not covered by the rules.

An example of this is article 15 of the ICC Arbitration Rules:

"1. The proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

2. in all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

3" The importance of this provision is explained in the UNCITRAL Notes on Organizing Arbitral Proceedings:

"4. Laws governing the arbitral procedure and arbitration rules that parties may agree upon typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings. This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.

5. Such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the proceedings and the manner in which the tribunal intends to proceed. This is particularly desirable in international arbitrations, where the participants may be accustomed to differing styles of conducting arbitrations. Without such guidance, a party may find aspects of the

proceedings unpredictable and difficult to prepare for. That may lead to misunderstandings, delays and increased costs."

6.4.6 Confidentiality

One of the advantages of arbitration over court litigation is the possibility of keeping confidential the existence of the controversy and the way in which it is resolved. Some domestic laws or institutional rules contain provisions in this connection. However, statutory or regulatory rules are generic and may not fulfill specific needs of the parties. For this reason, the parties must expressly agree on any special restriction to be imposed regarding the confidentiality of information relating to the case. This may comprise specific limitations on documents, written allegations or statements of third parties prepared for the arbitration, or about the award.

The UNCITRAL Notes on Organizing Arbitral Proceedings explain: "31. It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality.

Furthermore, the participants in arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g. because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access);circumstances in which confidential information may be disclosed impart or in whole (e.g. in the

context of disclosures of information in the public domain, or if required by law or a regulatory body).

6.4.7The seat or place of arbitration

it is important for the parties to an international arbitration to specify the seat or place of arbitration in the arbitration agreement. There are three different criteria to take into consideration at the time of choosing the seat of arbitration. They may be strategic, practical and legal. Strategic criteria have two aspects: neutrality and effectiveness. Apart from the strict impartiality of arbitrators, neutrality in arbitration also depends on its location. Naturally, the country of either of the parties is often discarded. Yet, even the election of third countries may affect neutrality. Effectiveness depends on the enforceability of the award made by arbitrators. Under the New York Convention, the place of arbitration may, indirectly and in the absence of express agreement, determine the law applicable to the validity of the arbitration agreement.36Friedland and Hornick explain its importance: "Parties rarely make an explicit selection as to the law governing their arbitration36Article V.1: Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

Agreement, even where they do make an explicit choice of governing substantive law. Hence, as a practical matter, the importance of article V.1.a is to make the law of the place of arbitration the applicable law, at the award enforcement stage, to disputes regarding the existence or validity of an arbitrationagreement".37Practical criteria give due consideration to such aspects as comfort, security and practicality for carrying out arbitration activities, i.e closeness to the parties' domicile or to the place where most evidence (documents or witnesses) is; availability of supporting services (suitable offices in which to hold hearings, communications, legal assistance); costs; personal security of arbitrators, etc. The legal criteria are connected to the natural consequence of the choice of the place of arbitration. In principle, the place of arbitration determines the procedural law applicable to the

arbitration and the extent of the intervention of national courts.38Although in theory the terms "seat of arbitration" and" procedural law" refer to different questions, there is a natural relationship between them inasmuch as the procedural law applicable to arbitration is the law of the place of arbitration. Professor Le Pera explains: ". the place of arbitration is significant because it determines the procedural law applicable to the arbitral proceedings, which in turn determines to which national law the award will belong. Once we accept, as the New York Convention does, that parties may select a procedural law other than the law of the place of arbitration, the selected procedural law eclipses the principle of territoriality. Lawyers rarely let clients execute an international contract without a designated substantive law, but often leave the place of arbitration open."39In consequence, the natural effect of the selection of the place of arbitration, unless the parties expressly agree on a different procedural law, is that it designates the procedural law applicable to the arbitration and the court jurisdiction in charge of solving any incidents taking place before or during arbitration. For this reason, before choosing the place of arbitration, the parties must make sure that the procedural law and the courts of that place are suitable(or that they are at least not overtly hostile) to solve the problems that may arise before or during the arbitration process.

The seat of arbitration is also significant because it provides the award with a" nationality", which is important to determine the applicable rules for the enforcement of the award. Most institutional rules establish that the award is deemed made in the place designated as the seat of the arbitration. According to the most widely accepted criterion, an award is considered "foreign", for the purposes of deciding whether the rules on recognition and enforceability of foreign awards are applicable to it, when it has been rendered out of the territory of the country where its recognition and enforcement is sought.40The term "seat" is indistinctly used to refer to a country or a city. In order to avoid doubts or mistakes, it is preferable to refer to a city. This recommendations particularly significant if the country in question has a federal system, since the reference to a country may involve different jurisdictions and even different laws. The concept of "seat" is therefore a legal rather than a physical concept. It is not essential that all procedural acts be carried out there, since arbitrators may order procedural acts, even hearings, to be carried out in different places. In institutional arbitration, not designating the place of arbitration implies delegating the power to determine it to the arbitral institution or to the arbitrators, as the case may be. In ad hoc arbitrations, if the parties choose theUNCITRAL Rules,

they provide for a similar solution: unless the parties have agreed upon the place where the arbitration is to be held, it will be determined by the arbitral tribunal, having regard to the circumstances of the arbitration (Article 16.1).

6.4.8 The procedural law

As we have seen, it is widely held that the parties may agree to apply procedural law other than the law of the seat of arbitration. If, for strategic or practical reasons, the parties prefer a specific seat for the arbitration, they are not obliged to submit to the procedural law of that country.41But an express agreement will be necessary for that purpose, since in case of silence the procedural law will be that of the seat of arbitration. It is necessary, however, to bear in mind that under the Model Law, the place of arbitration is an exclusive factor for determining the applicable procedural law. The historical background indicates that the purpose of that law was to discourage the parties from agreeing on a procedural law other than the one applicable in the place of arbitration, although there is no prohibition expressly stated in the text of the rule.

The factors leading to that decision appear in the Explanatory Note by theUNCITRAL Secretariat on the Model Law on International Commercial Arbitration: "The strict territorial criterion, governing the bulk of the provisions of the Model Law, was adopted for the sake of certainty and in view of the following facts. The place of arbitration is used as the exclusive criterion by the great majority of national laws and, where national laws allow parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties in practice rarely make use of that facility. The Model Law, by its liberal contents, further reduces the need for such choice of a "foreign" law in lieu of the (Model) Law of the place of arbitration, not the least because it grants parties wide freedom in shaping the rules of the arbitral proceedings. This includes the possibility of incorporating into the arbitration agreement procedural provisions of a "foreign" law, provided there is no conflict with the few mandatory provisions of the Model Law. Furthermore, the strict territorial criterion is of considerable practical benefit in respect of articles 11, 13, 14, 16, 27 and 34, which entrust the courts of the respective State with functions of arbitration assistance and supervision".

Among the practical criteria that prevailed in that decision is the importance of avoiding possible jurisdictional conflicts between courts of the country of the seat of arbitration and those of the country to whose

procedural law the parties have submitted, especially when public policy rules of the applicable procedural law are involved.436.4.9Determination of the language In conflicts involving parties of different nationalities, the selection of the language of arbitration is not a minor issue . Once a conflict arises, it is difficult to solve differences on this subject, since each party will try to use its own language. The question, however, does not come down to a mere language problem. On several occasions, choosing the language entails a decision on the arbitrators' culture.

A Hispanic arbitrator is not likely to apply the same legal reasoning as one who has received his legal training in English or Arabic. In institutional arbitrations, the lack of agreement between the parties concerning the language may be supplied by the institution. In ad hoc arbitrations, conversely, this question is resolved by the arbitral tribunal.

The UNCITRAL Arbitration Rules (article 17) set forth that:

"1. subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determines the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal."

6.4.10 Determination of the applicable substantive law or equity arbitration

One of the most significant questions to be decided by the parties when drafting the arbitration agreement is the scope of the powers conferred upon arbitrators concerning the settlement of the conflict. A first decision must involve the arbitrators' nature, that is, whether they are arbitrators of law or amiable compositeur. Arbitrators of law decide controverter issues in accordance with the applicable legislation. The solution contained in the award is based on a rule of law. Instead, amiable compositeur issue their judgment ex aequo et bono. They are not obliged to rule in accordance with legal principles and are enabled to found their award on equity criteria as opposed to strictly formulated rules of law.

Even though amiable composition was historically the natural condition for arbitration, the trend has lately been to favor arbitration of law. Nowadays most legislations and rules establish that arbitration will be ex aequo ET bonoonly if the parties have expressly so agreed. In the case of silence, the arbitration shall be an arbitration of law. That is, for example, expressly provided in theUNCITRAL Arbitration Rules (article 33.2) and the UNCITRAL Model Law (article 28.3).In the case of arbitration of law, it is important that the parties determine the applicable law. Strictly speaking, it is preferable to use "rules of law," as does the Model Law, rather than "law." "Law" may be interpreted as referring to the law in a certain country. "Rules of law", conversely, is a considerably broader expression as it even allows the application of rules derived from international conventions and uniform laws – even if they are not in force –, parts of different legal

Systems or provisions of laws that are no longer in force as well as restatements or compilations, such as the UNIDROIT Principles of International Commercial Contracts. The Principles may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law. As the Principles represent a system of rules of contract law that are common to existing national legal systems or particularly adapted to the special requirements of international commercial transactions, there might be good reasons for the parties to choose them expressly as the rules applicable to their contract, in the place of one or another specific domestic law. By "applicable law" we mean the substantive law and not the conflict of law rules. The concepts that used to restrict the parties' free will to directly choose the applicable law have fallen into disuse. It is generally agreed that the parties are entitled to choose the rules of law applicable to the substance of the dispute, thus avoiding reference to the rules of conflict that indirectly determine the applicable law. Under the UNCITRAL Arbitration Rules, the express designation of the law applicable to the arbitration agreement is all the more significant in view of the completive rule to be applied in the case of silence by the parties. Both the Model Law (article 28.2) and the Rules (article 33.1) prescribe that failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable. This leads to an indetermination of the applicable substantive law, taking account of the difficulties usually arising when applying conflict of laws rules. Some rules (ICC Rules, article 17.1) enable the arbitration tribunal to determine the law applicable to the substance of the conflict: "The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such

agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate".44Thisprovision was part of the amendment that came into force in 1998.45At any rate, irrespective of the substantive law that the parties –or the arbitrators, as the case may be– may have determined as applicable in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction(article 28.4, Model Law).

6.4.11 Recourse against award

In general terms, there two types of recourse against arbitral awards: request for appeal and request for setting aside. The purpose of a request for appeal is that a higher organ entirely reviews the decision of the arbitrators who made the award. This type of recourse allows for revision of the substance of the award, its merits, evaluation of evidence, and the law as applied and interpreted by the arbitrators, as the case may be. The purpose of the request for setting aside is for a court to declare the invalidity of the award contending that it does not meet the validity requirements set by the law. During the instance of annulment, the judge only controls the fulfillment of legal requirements without evaluating the rightfulness, the substance or merits of the award. The judge must only rule on the existence or non-existence of grounds that could adversely affect the validity of the award. The recourse is admissible only in the cases or situations set forth by the law. The modern trend is to waive the request for appeal and there are only a few institutional rules and national laws that have appeal procedures. Even in those cases, the parties may agree on waiving their right to use the recourse. The most common rules point out that the award is unappeasable, but the parties are allowed to agree on the appeal. There are some legal systems under which appeal is not allowed, even if it is agreed upon by the parties.46On the contrary, the right to set aside is generally not subject to the parties 'will. Since it entails judicial control over the activity of private jurisdiction carried out by arbitrators, the right to request the courts to set aside the award is considered to be a matter of public policy. The law in only a very few countries allows the parties to waive this recourse, and when they do, the waiver is subject to certain conditions. For example, the Belgian Judicial Code(1998) states: "The parties may, by an explicit declaration in the arbitration agreement or by a later agreement, exclude any application for the setting aside of an arbitral award, in case none of them is a physical person of Belgian nationality or a physical person having his normal residence in Belgium or a legal person having its main seat or a branch office in Belgium" (article 1717.4).Similar provisions

can be found in article 192 of the Swiss law (Federal Law of Intonation Private Law of 1987) and article 126 of the Peruvian arbitration law (Law N° 26,572 of 1996).In conclusion, when drafting the arbitration agreement, two things should be given due consideration regarding the procedural law applicable to the recourse against the award: on the one hand, which question are subject to modification and, on the other, what the suppressive rules are.

As regards the motion for appeal, there may be several cases:

•The procedural law states that the award is appeal able. In this case, if the parties do not want to raise the recourse, they should expressly waive it.

•The procedural law states that the award is unappeasable, but allows for agreement to the contrary. In this case, if the parties want an instance of broad revision, they must expressly agree on it.

•The procedural law states that the award can never be appealed before courts, regardless of what the parties agree. In this case, they are not allowed to incorporate the recourse, not even by express agreement. The parties may, nevertheless, agree on recourse before an arbitral tribunal of second instance, if one exists. In relation to the request for setting aside, there are only two possible cases:

•The law does not provide the possibility of waiving the recourse. In this case, any agreement to the contrary by the parties will be invalid.

•The law allows the parties to waive the recourse or to restrict the grounds for raising it. In this case, they should check whether total or partial waiver of the recourse is provided for by the law.

6.5 Summary

There are many questions to take into consideration at the time of entering into an arbitration agreement. One of them is whether it is advisable to agree on arbitration to settle future controversies or do so only in the face of real and existing conflicts. In practice, only in a few cases do the parties manage to agree on submitting to arbitration when confronted with actual conflicts. In order to ensure the possibility to resort to arbitration, the parties must agree to do so in the original contract. When drafting the agreement, especially if it is an arbitration clause (as defined in 5.2.1.), the parties must take the need for clarity into account. The agreement must provide certainly and without doubt for

arbitration. It is advisable to avoid the use of ambiguous or confusing terms that may later give rise to disagreement.

Especially when defining the scope of conflicts submitted to arbitration, it is necessary to use broad formulas that cannot be interpreted as restrictive. A first decision to make concerns the kind of arbitration to agree upon. This may be either ad hoc or institutional. The advantages or disadvantages of each cannot be determined a priori, although it should be admitted that institutional arbitration is more predictable and requires less cooperation from the opposing party.

In the case of institutional arbitration, the parties must carefully choose the institution to which they will submit their disputes. Given the great number and variety of arbitral institutions, it is necessary to analyze the provisions contained in their rules, the manner in which arbitrators are selected and costs. In order to avoid confusion in the identification of the institution or misinterpretations concerning the scope of the agreement, it is recommendable to adopt the model clauses commonly used by the institution. In ad hoc arbitration, it is essential that the arbitration agreement contain the manner in which arbitrators are to be appointed. One possible –and advisable–way is to designate in the agreement an appointing authority to prevent the arbitration from being delayed or frustrated by the lack of cooperation of one of the parties to designate the arbitrators. In institutional arbitration, even though the rules contain provisions on this issue, the parties are generally authorized to agree on a different manner of appointing arbitrators. It is also important to expressly agree on the number of arbitrators who will participate in the arbitral tribunal. In institutional arbitrations, this is normally provided in the rules, although with a suppressive nature. The parties may also agree on special requirements to appoint arbitrators, such as profession, nationality, etc. This provision helps to assure the appointment of arbitrators with the qualifications desired by the parties. In choosing institutional arbitration, the parties also submit to the rules of the institution. However, they may want to incorporate some specific procedural rules that are not contained in the rules, or modify some of the regulatory ones. Before doing so, they should consult with the institution. In ad hoc arbitration, where the parties must agree on the rules of procedure, theUNCITRAL AL Arbitration Rules are a good option. If the parties are particularly interested in confidentiality, they should include a provision on the matter. Even in institutional arbitration, regulatory provisions are often generic and may therefore fail to meet the parties' needs. Determining the place of arbitration is one of the most important questions to consider regarding the arbitration

agreement. The most significant aspect is that the place of arbitration usually also determines the procedural law applicable to the arbitration and the extent of the court's jurisdiction. Apart from this, there are considerations of a strategic (neutrality and effectiveness of the award) and practical (comfort and costs) nature that make it convenient to expressly agree on such questions. Hence, even in institutional arbitrations it is advisable that the seat of arbitration be chosen by the parties themselves. The parties are usually entitled to agree on the application of a procedural law other than the one of the seat of arbitration. However, this is not to be recommended. In the absence of agreement, the procedural law will be the one of the seat of arbitration.

The question of language in arbitration is more important than it seems at first glance. The selection of the language also points to a certain cultural profile of arbitrators. In institutional arbitration, a lack of agreement between the parties as to the language is made up for by the institution. In ad hoc arbitration, this question is resolved by the arbitral tribunal. Another essential question to be considered by the parties concerns the rules applicable to the substance of the dispute. The parties may decide that the arbitrator will rule ex aequo et bono or that he will rule in accordance with rules of law. If they want arbitrators to be amiable compositeur, they must, according to the most widespread principle, expressly agree so, since in the case of silence the arbitration will be an arbitration of law. Once this type of arbitration is agreed upon, the determination of the rules of law applicable to the substance of the dispute is important because it provides certainty and predictability to the solution to the conflict. Some laws provide for a motion for appeal against awards. When available, this recourse, which allows for broad review of the award, the parties may waive it or agree on it under certain conditions. On the contrary, the right to request that the award be set aside, whereby only the validity of the award is revised, is almost never subject to the parties 'will. Exceptionally, some domestic laws allow the parties to waive this recourse only under certain conditions (usually for international arbitrations that do not involve nationals)

Chapter four

DISPUTE RESOLUTION METHODS IN ELECTRONIC COMMERCE

1.1 Introduction

Electronic commerce operations are based on contracts concluded electronically between "absent" co-contractors (i.e. those who do not physically meet). The conclusion of an electronic contract is often prolonged by the electronic execution of the contract, which consists of opening access to a database, downloading software and transmitting an item of information. These electronic operations can give rise to disputes, just as in traditional commerce. A co-contractor might complain of poor execution of the contract, stating that the goods that were ordered electronically, for delivery by traditional logistical means, arrived in a damaged condition or did not conform. Another complaint might be that, at the time when a contract was to be executed electronically, a transmission error occurred, impeding access to the information. The service was thus not provided or the non-physical object of the contract was not delivered. The electronic network on which co-contractors "meet" may also give rise to more specific disputes relating to the use of computer resources. For example, a client might not have sent his/her electronic acceptance of a contract offer immediately, yet maintains that the contract exists, whereas the offerer might claim to have retracted the offer before it was accepted. Sometimes, disputes may even arise that are outside the sphere of the contract. For example, an Internet user who has downloaded a piece of software might discover a security failing that allows third parties to access the personal data on his/her computer; that user might then accuse the publisher of having committed or facilitated an invasion of privacy.

Finally, disputes may arise between electronic commerce operators in a strictly extra-contractual situation. For example, a false piece of information concerning a competitor is distributed on the network, causing that competitor significant harm. In this scenario, there is no contract linking the litigants. These electronic commerce disputes can involve fairly diverse protagonists. Traditionally, operations are divided into those between businesses (business to business, or B2B) and consumer operations (business to consumer, or B2C).1B2B operations involve transactions worth higher amounts, as they are concluded, for example, between a manufacturer and a number of suppliers in an electronic marketplace. By contrast, B2C operations often involve low amounts, causing them to be termed "micro-transactions",2 for example

where a contract covers access to an article or a music file. These operations represent.

Part 1

Advantages of Online Dispute Resolution

Online dispute resolution helps reduce the costs of dispute resolution. Secondly, it encourages better enforcement of the solution recommended or imposed by the chosen institution.

1. Cost-effectiveness

Dispute resolution is cost effective because of (a) rapid processing of disputes, (b) The lower costs involved and (c) only partial assumption of the operating Costs by the parties.

(a) Speed of Dispute Resolution

Traditionally, the main advantage associated with ADR is in achieving a rapid Solution that does not paralyse business life and the normal exchanges between Commercial partners. Proceedings in a State court are known often to take Months, even years, to reach a conclusion. By contrast, ADR shortens the Process of handling disputes. The same is true of fast-track arbitration systems, the main advantage of which is the speed of the procedure. When working Online, the instantaneous circulation of information reduces the time still further. Of course, the arbitrators always need a certain amount of time to familiarize themselves with the file and to make an award. It is also true that the lack of complexity in "quality disputes" helps speed up the procedure. Thus the majority of organizations offering online dispute resolution emphasize the speed of the procedure.

(b) Lower Costs

Online dispute resolution allows the dispute to be settled remotely, without requiring the parties or their legal representatives to be physically present. The parties merely have to connect from their workplaces to the site of the chosen organization and transfer documents and data messages for the cost of a local phone call. This is a crucial advantage in international disputes, where, normally, one of the parties would have to travel to appear before the courts in the country of the other party. This would also be the case in traditional forms of arbitration or ADR (including mini-trial and fast-track arbitration), all of

which require hearings and a physical meeting between the parties. Certain methods of online dispute resolution offer even greater cost reduction, because they reduce the need for human intervention in the dispute handling process. For example, with automated settlement assistance systems, the computer calculates the value of the settlement on the basis of the claims of each party. The costs are generally a proportion of the value of the dispute; 4for a dispute involving a sum of less than US$ 10,000, the average cost is US$ When human intervention is necessary, whether in systems of electronic conciliation or electronic arbitration, significant cost reduction seems possible only for disputes that do not involve overly complex legal questions and that do not require an expert's presence. A dispute relating to registration of domain names is a case in point, because the panel members only have to confirm that the claimant is the owner of the trademark and that the respondent made a bad-faith registration. The same is true in some "quality disputes", where one party complains about the non-performance of a contract. The third party chosen by the parties merely has to confirm non-performance. Electronic non-performance is not always easy to establish. When a software publisher or database owner does not supply the necessary access code, non- performance is quite clear. However, it is much less clear when, for example, the software does not work well on the client's computer, and it is not known whether that is the fault of the software or the operating system.

(c) Financing of Online Dispute Resolution

The system for financing online dispute resolution sometimes further reduces the costs charged to the Internet user/consumer. The costs are not always shared equally between the litigants. If the business is affiliated to a quality label programme, then electronic arbitration or mediation costs the claimant nothing. It is financed by the business's annual subscription to the certification programme. Another system charges the entire arbitration costs exclusively to the business. Traditionally, arbitration costs are shared equally between the parties, unless the award specifies that the losing party is to pay the entire cost. At first sight, these systems therefore seem very favorable to the client, who benefits from free access to extra-judicial methods of dispute settlement. This unilateral financing does, however, call for particular vigilance regarding the independence of the dispute resolution body, which might show a certain bias towards the business. After all, the business might be a "serial litigant", providing regular cases for the arbitral tribunal. This argument should not,

However, be overstated, because an arbitration award made contrary to the principle of independence will not receive the exequatur of the State courts in the majority of States.

2.Effectiveness of Solutions, Recommended or Imposed

Online dispute resolution tends to be more effective, either because of Spontaneous implementation or by the exercise of a form of electronic a) ***Conciliation or Mediation***

The clause on mediation or conciliation by electronic means, as with any Contractual clause, commits the parties that have consented thereto. The parties are therefore obliged to initiate the conciliation or mediation procedure. Once a dispute has arisen, they may not seek to avoid resort to conciliation on the grounds that their claims are firm and they consider them to be well founded.

However, since the mediation or conciliation clause imposes an obligation to achieve a result, the parties must take part in the electronic mediation process. The obligation to initiate negotiations does not mean that they have to be continued if they seem likely to fail, nor of course that the parties have to reach an agreement. The co-contractors must simply take the first step towards mediation or conciliation. Non-performance of this obligation is liable to various sanctions. First, it can give rise to an award for damages and interest, as with any contractual non-performance. This sanction does not seem very widespread; comparative law shows that a procedural sanction is more common. When the parties ignore the obligation to go to conciliation, the French courts refuse to acknowledge the dispute and declare that the claimant has no right to bring the action (fin de non reservoir).As for American courts; they enforce the clause in kind and send the parties back to the mediator or conciliator.

Such decisions, rendered in respect of traditional mediation or conciliation, are entirely transferable to online dispute resolution. Once the procedure is under way, the parties are only bound by a "duty of diligence", i.e. they must negotiate in good faith, but are not in any way bound to come to an agreement. In common law countries, the "duty of diligence" is known as the obligation to make "best efforts". When the parties see that the conciliation or mediation process is not heading for a successful outcome, they can stop it. Stopping the negotiations at this stage does not incur any sanction. A ruling that the recalcitrant party will have to pay damages and

Interest requires proof, by citing specific conduct that it refused to negotiate in good faith. If the parties see the mediation or conciliation process through to the end, and make reciprocal concessions, a settlement agreement is recorded. This has the effect of ending the dispute, with each party making specific undertakings that are binding. Their enforcement may subsequently be pursued before the State Courts. When mediation takes place entirely online, the settlement is recorded in an electronic agreement. It has to be confirmed that this electronic agreement is effective under common law. On the face of it, this does not appear to raise any difficulties, because of the universal trend towards accepting electronic documents as evidence and as a condition for validity Moreover, in the absence of specific conditions regarding Moreover, in the absence of specific conditions regarding validity, the settlement agreement is subject to the rules of common contract law b) Arbitration The decision to go to arbitration places greater constraints on the parties in dispute, in terms of their conduct both during and after the electronic procedure. The arbitral clause, by which the parties consent in advance to submit any dispute, that arises to an arbitral tribunal, has a dual effect. The positive effect lies in according competence to the arbitrator or to the arbitral tribunal appointed in the clause. According competence in this way also has the negative effect of rendering State courts incompetent. Consequently, when the parties agree electronically to an arbitral clause, the validity of which is not contested, they cannot bring the dispute before a judge in their own country. Clicking to accept the electronic general conditions must therefore not be done lightly. That being the case, the co-contractors cannot choose not to take part in the arbitration just because the procedure is electronic. If they refuse to appoint an arbitrator, to produce a statement of defense or to communicate electronic documents, the electronic procedure will go ahead without the defaulting party and an award may be rendered by default. If the electronic document fulfils the necessary conditions for the award to be rendered, it is binding on the parties. The party that wins can even demand ratification (exequatur) in the State of the losing party.

1.4 ***Conclusion***

The drafter of an extra-judicial dispute settlement clause and the clients must carry out a thorough analysis of terms. The choice of the mediation, conciliation or arbitration clause defines their respective obligations during and after the electronic procedure. The online mediation or arbitration process, while appearing more innocuous and less formal, nonetheless places obligations on the parties that are sanctioned by law. Electronic mediation and conciliation fall entirely within the contractual

field. It is the will of the parties that determines the form they take and the consent of the parties is sought when the settlement agreement is concluded. Once the principle of concluding contracts electronically is accepted, electronic mediation and conciliation do not raise any particular difficulty. Electronic arbitration, on the other hand, raises more of a problem because of the various demands imposed by national laws and international agreements. This is discussed in greater detail later in this module: section 2 discusses the formation of the electronic arbitration agreement, section 3, and the conduct of the online arbitration procedure and section 4 the efficacy of electronic arbitration. In all these cases, it needs to be established whether electronic arbitration satisfies the conditions of the law or of international agreements.

Part two

DISPUTE RESOLUTION METHODS IN ELECTRONIC COMMERCE

1.1 Introduction

Electronic commerce operations are based on contracts concluded electronically between "absent" co-contractors (i.e. those who do not physically meet). The conclusion of an electronic contract is often prolonged by the electronic execution of the contract, which consists of opening access to database, downloading software and transmitting an item of information.

These electronic operations can give rise to disputes, just as in traditional commerce. A co-contractor might complain of poor execution of the contract, stating that the goods that were ordered electronically, for delivery by traditional logistical means, arrived in a damaged condition or did not conform. Another complaint might be that, at the time when a contract was to be executed electronically, a transmission error occurred, impeding access to the information. The service was thus not provided or the non-physical object of the contract was not delivered. The electronic network on which co-contractors "meet" may also give rise to more specific disputes relating to the use of computer resources. For example, a client might not have sent his/her electronic acceptance of a contract offer immediately, yet maintains that the contract exists, whereas the offerer might claim to have retracted the offer before it was accepted. Sometimes, disputes may even arise that are outside the sphere of the contract. For example, an Internet user who has downloaded a piece of software might discover a security failing that allows third

parties to access the personal data on his/her computer; that user might then accuse the publisher of having committed or facilitated an invasion of privacy.

Finally, disputes may arise between electronic commerce operators in a strictly extra-contractual situation. For example, a false piece of information concerning a competitor is distributed on the network, causing that competitor significant harm.

In this scenario, there is no contract linking the litigants. These electronic commerce disputes can involve fairly diverse protagonists. Traditionally, operations are divided into those between businesses (business to business, or B2B) and consumer operations[3] *(business to consumer, or B2C).1B2B operations involve transactions worth higher amounts, as they are concluded, for example, between a manufacturer and a number of suppliers in an electronic marketplace. By contrast, B2C operations often involve low amounts, causing them to be termed "micro-transactions", for example where a contract covers access to an article or a music file.* [4]*These operations represent a small fraction of the value of overall electronic commerce activity.*

However, they should not be underestimated, since consumer activities are mass activities, meaning that while the unit value of the transactions may be low, the number of operations is large, and there is potential for many disputes to arise.

At first sight, these electronic trade disputes can be resolved by traditional means. The parties are still at liberty to refer the case to a State court, although if one of the co-contractors is based in another country, it is not certain that the other party will go to court on the claimant's home territory. Even if a decision is handed down, it is not certain to be executed in a foreign country. The parties may then resort to ADR, and even to arbitration, as in disputes in the physical world. In theory, there is therefore no need to use online dispute resolution to settle an electronic commerce dispute. Conversely, disputes concerning the non-electronic world can be submitted to online dispute resolution, even though the litigants are in a position physically to meet.

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[3] UNCTAD, E-Commerce and Development Report 2001, New York, 2001, esp. p. 99.

4 Cachard, O, «La régulation internationale du marché électronique» [International Regulation of the Electronic Market] Paris, Librairie Générale de Droit et de Jurisprudence 2002, p. 480

In practice, there is, however, an in dissociable link between electronic commerce operations and online dispute resolution. For economic and sociological reasons, online dispute resolution will be the preferred means of dealing with disputes on the Internet and on private networks (Intranet).First of all, a brief overview of online dispute resolution is in order. It is necessarily brief because the private organizations that offer dispute resolution services are very inventive. The variety of approaches that this creates, already highlighted in the ADR methods between operators in traditional commerce،[5] is further increased by technology. The most immediate contribution of information technology in ADR is in the implementation of automated settlement assistance systems. Each party to the dispute assesses the value of its claim and sends it to the automated system. Using methods of calculation and criteria known to the litigants, the computer suggests - when the difference is not too great - a price on which the parties can agree.

This system has enjoyed considerable success in disputes between insurers and insured. However, it is applicable only when the claimant is seeking a sum of money. Information technology also contributes to the development of online mediation and conciliation systems. The conciliation or mediation body tries to bring the conflicting parties together, in order to arrive at an agreement that is then formalized in a settlement agreement.

While the mediator or conciliator does play an active role, he/she cannot impose an agreement on the parties. The new technology removes the need for the parties to meet physically; it replaces these meetings with electronic exchanges

Finally, arbitral institutions propose a partially or totally electronic procedure. The arbitrator is the third party, entrusted by the disputing parties with the task of settling their dispute. At the end of the arbitration procedure, he/she makes an award which is binding on the parties and which is invested with the authority of res judicata. Here too, the Internet facilitates the remote administration of the procedure and does not require the attendance of the parties or their legal representatives.

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5 Fouchard P, «Arbitrage et modes alternatifs de règlement des litiges du commerce international»,[Arbitration and Alternative Dispute Resolution in International Trade]. In: Souveraineté étatique et marchés internationaux, A propos de 30 ans de recherché du CREDIMI [State sovereignty and International Markets, 30 Years of CREDIMI Research], pp. 95-115; Jarrosson C, «Les modes alternatifs de règlement des conflits, présentation générale» [Alternative dispute resolution, general presentation], Revue Internationale de Droit Comparé [International Review of Comparative Law], 1997 (2) pp. 325-345.

There is one last type of online dispute resolution worth mentioning briefly, even though it concerns a particular kind of dispute. When owners of trademarks cannot register their domain names because other more diligent operators have registered those names in bad faith ("cyber squatting"), they can refer the matter by electronic means to one of the organizations approved by the Internet Corporation for Assigned Names and Numbers (ICANN) in order to have the disputed domain name transferred or deleted. ICANN's competence is based on the contract signed by the owner of the domain name when it was registered. This is not strictly speaking an arbitration procedure, since once the decision has been handed down; the parties can always refer to a judge for settlement of the dispute. It is a sui generis procedure, also known as an "administrative procedure".

At first sight, the simplistic view is that electronic arbitration lends itself to B2B disputes, whereas B2C disputes would be more satisfactorily resolved by mediation or conciliation. This is the dominant view in Europe by virtue of current legislation, but it needs to be qualified. In reality, mediation and Conciliation is also used between businesses in traditional international trade. Moreover, in some legal traditions (e.g. that of the United States), arbitration is accepted as being able to settle disputes involving one weak party, such as the consumer.

Thus, for a matter to be submitted to online dispute resolution, it must meet two conditions. First, the rules of the body chosen to settle the dispute need to be verified, to ensure that they are not restricted to one particular type of player (businesses or consumers). Secondly, it should be ascertained that the law allows the dispute to be submitted to a particular form of online dispute resolution. This applies particularly to the question of the arbitrability of consumer disputes.

In section 1.2, we look at the advantages of online dispute resolution. The Effectiveness of this method should make it the natural choice for resolving Disputes in electronic commerce. While all methods of online dispute resolution depend on the will of the parties and the force of the contract, the extent of the litigants' obligations differ according to the type of online dispute resolution chosen. The method of dispute resolution should therefore always be specified in order to define the obligations of the parties and to consider the sanctions for non-fulfillment of those obligations.

1.2 Advantages of Online Dispute Resolution

Online dispute resolution helps reduce the costs of dispute resolution. Secondly, it encourages better enforcement of the solution recommended or imposed by the chosen institution.

1.2.1 Cost-effectiveness

Dispute resolution is cost effective because of (a) rapid processing of disputes, (b) The lower costs involved and (c) only partial assumption of the operating Costs by the parties.

(a) Speed of Dispute Resolution

Traditionally, the main advantage associated with ADR is in achieving a rapid solution that does not paralyse business life and the normal exchanges between commercial partners. Proceedings in a State court are known often to take months, even years, to reach a conclusion. By contrast, ADR shortens the process of handling disputes. The same is true of fast-track arbitration systems, the main advantage of which is the speed of the procedure. When working online, the instantaneous circulation of information reduces the time still further. Of course, the arbitrators always need a certain amount of time to familiarize themselves with the file and to make an award. It is also true that the lack of Complexity in "quality disputes" helps speed up the procedure. Thus the Majority of organizations offering online dispute resolution emphasize the speed of the procedure [6]

(b) Lower Costs

Online dispute resolution allows the dispute to be settled remotely, without requiring the parties or their legal representatives to be physically present. The parties merely have to connect from their workplaces to the site of the Chosen organization and transfer documents and data messages for the cost of a local phone call. This is a crucial advantage in international disputes, where, normally, one of the parties would have to travel to appear before the courts in the country of the other party. This would also be the case in traditional forms of arbitration or ADR (including mini-trial and fast-track arbitration), all of which require hearings and a physical meeting between the parties.

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6 See for example the electronic procedure to which the clients of the Ford website have agreed. The time between submission of documents and the rendering of the award should not exceed 15 workingdays.CharteredInstituteofArbitrators,UnitedKingdom,at: <www.arbitrators.org/fordjourn ey/index.htm>.

Certain methods of online dispute resolution offer even greater cost reduction, because they reduce the need for human intervention in the dispute handling process. For example, with automated settlement assistance systems, the computer calculates the value of the settlement on the basis of the claims of each party. The costs are generally a proportion of the value of the dispute; [(١)] *for a dispute involving a sum of less than US$ 10,000, the average cost is US$100.*[7]

When human intervention is necessary, whether in systems of electronic conciliation or electronic arbitration,[8] *significant cost reduction seems possible only for disputes that do not involve overly complex legal questions and that do not require an expert's presence. A dispute relating to registration of domain names is a case in point, because the panel members only have to confirm that the claimant is the owner of the trademark and that the respondent made a bad-faith registration. The same is true in some "quality disputes", where one party complains about the non-performance of a contract. The third party chosen by the parties merely has to confirm non-performance. Electronic nonperformance is not always easy to establish. When a software publisher or database owner does not supply the necessary access code, non-performance is quite clear. However, it is much less clear when, for example, the software does not work well on the client's computer, and it is not known whether that is the fault of the software or the operating system.*

(c) Financing of Online Dispute Resolution

The system for financing online dispute resolution sometimes further reduces the costs charged to the Internet user/consumer. The costs are not always shared equally between the litigants.[9] *If the business is affiliated to a quality label programme, then electronic arbitration or mediation costs the claimant nothing.*[10] *It is financed by the business's annual subscription to the certification programme. Another system*

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7 Schultz T et al., «Online Dispute Resolution: The State of the Art and the Issues». E-com Research Project of the University of Geneva, Geneva, 2001, p. 61. Available on the Internet at: <http:// www.online.adr.org>.

8 Schultz T and Gabrielle Kaufmann-Kohler G op. cit., passim.

9 http://www.webassured.com.

10 http://www.webassured.com.

charges the entire arbitration costs exclusively to the business. Traditionally, arbitration costs are shared equally between the parties, unless the award specifies that the losing party is to pay the entire cost.

At first sight, these systems therefore seem very favorable to the client, who benefits from free access to extra-judicial methods of dispute settlement. This unilateral financing does, however,[11] *call for particular vigilance regarding the independence of the dispute resolution body, which might show a certain bias towards the business. After all, the business might be a "serial litigant", providing regular cases for the arbitral tribunal. This argument should not, however, be overstated, because an arbitration award made contrary to the principle of independence will not receive the exequatur of the State courts in the majority of States.*[12]

1.2.2 Effectiveness of Solutions, Recommended or Imposed

Online dispute resolution tends to be more effective, either because of spontaneous implementation or by the exercise of a form of electronic the idea of spontaneous implementation of the solution by the parties is often presented as the natural outcome of alternative methods of dispute resolution.

Parties are likely to implement a settlement agreement concluded following mediation or conciliation. Where arbitration is concerned, the spontaneous implementation of awards has prevailed despite a rise in post-arbitral disputes.

The electronic nature of the process and the players' involvement in the electronic market tend to favour proper enforcement of the settlement agreement or the award. Also, since the parties do not meet physically in online dispute resolution, it takes the emotion out of the dispute and encourages a rational settlement.

In general, instantaneous circulation of information on communication networks can make the recalcitrant party fearful of bad publicity in the electronic market. When the arbitration or mediation is part of a labeling

11 http://www.fordjourney.com.

12 Fouchard P, Gaillard E and Goldman B. On Commercial International Arbitration, Kluwer Law International, 1999; Fouchard P, Gaillard E and Goldman B. Traité de l'arbitrage commercial international [International Commercial Arbitration Treaty], Paris, Litec, 1996, p.1225.

or certification programme, the label can be withdrawn as a sanction for refusing to enforce the award or the settlement agreement. This can have the effect of making Consumers or other clients somewhat mistrustful of that business. Also, blacklisting and even calls for boycotts may cause damage to the operator.

The increase in satirical sites that misappropriate brands often constitutes an illegal threat that operators must counter by referring the matter to State courts in order to put an end to these unfair activities. A dissatisfied client should therefore be wary of malicious misuse of a brand on the Internet, because the law ensures that trademarks and logos are respected. The power of electronic constraint is even more direct in the particular case of domain name disputes.

If, following an administrative procedure, the panel orders the transfer or deletion of a domain name registered in bad faith by a squatter, this deletion is actually implemented by the registering authority. However, there is no such power of constraint for contractual disputes in the Electronic market.

When the dispute relates to a sum of money, the parties are required to block the disputed sum in a bank account. Such a demand makes access to justice more difficult. In any case, the obligation of cautio judicatum solvi no longer exists in many States. This system could not therefore be reintroduced for online dispute resolution.

1.3 Assessing Methods of Online Dispute Resolution

The rapid rise of online dispute resolution, using various formulae specific to each resolution organization, does not dispense with the need to assess the process or procedure being considered. Indeed, this assessment determines the subsequent conduct of the parties and their respective obligations throughout the online dispute resolution process. In this subsection, we first identify the determining factors, and then measure the extent of the obligations of the parties when they agree to settle their dispute by electronic means.

1.3.1 Determining Factors

The first determining factor is the mission given by the parties to their chosen third party. When this third party's mission is to try to bring the parties together so that they can reach an agreement among themselves, this automatically means mediation or conciliation. The various systems give differing scope for initiative on the part of the conciliator or

mediator, who may go so far as to formulate proposals or recommendations. The mediator is generally seen as more active than the conciliator.[13]

The task of an arbitrator, on the other hand - if his/her competence is based on a contract - is jurisdictional. He/she therefore settles disputes in law, and his/her decision is binding on the parties. The second determining factor, which is an immediate extension of the first, depends on the authority vested in the chosen arbitrator. An arbitral award settles the dispute definitively, and is final and binding. It is deemed to have the authority of res judicata as soon as it is made. The losing party must therefore abide by it, under constraint if necessary, once the award has been ratified. The proposals or recommendations of a mediator, on the other hand, are not binding.

At the end of the process, the parties must conclude a settlement agreement.([14]The determining factors for choosing arbitration and mediation are therefore mutually exclusive. However, often the parties use both these methods of dispute resolution in succession. If mediation or conciliation fails, the litigants have to submit to arbitration. When the two methods of dispute resolution are used in succession, a person may not, in principle, be appointed as arbitrator if he/she has previously acted in the role of conciliator.

1.3.2 Consequences of a Decision

Depending on whether mediation or arbitration is chosen, the litigants have different obligations. While conciliation or mediation may seem less restrictive, the parties are nonetheless bound by obligations of diligence or result, and face sanctions for non-performance. The arbitral clause for its part shows the commitment of the parties to submit their dispute to arbitration Therefore, when the client concludes a contract electronically، he/she must take care to observe its general terms which do not allow either passive conduct or direct referral to State courts.

(a) Conciliation or Mediation

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13 Jarrosson C, (La notion d'arbitrage1 [The concept of arbitration], Paris, Librairie Générale deDroit et de Jurisprudence, No. 348, 1987

14 Fouchard P, Gaillard E and Goldman B, On International Commercial Arbitration, No. 21. Theauthors point out the exception of «MedArb», where the mediator is designated as an arbitrator in the event that mediation fails.

The clause on mediation or conciliation by electronic means, as with any contractual clause, commits the parties that have consented thereto. The parties are therefore obliged to initiate the conciliation or mediation procedure. Once a dispute has arisen, they may not seek to avoid resort to conciliation on the Grounds that their claims are firm and they consider them to be well founded. However, since the mediation or conciliation clause imposes an obligation to achieve a result, the parties must take part in the electronic mediation process.

The obligation to initiate negotiations does not mean that they have to be continued if they seem likely to fail, nor of course that the parties have to reach an agreement. The co-contractors must simply take the first step towards mediation or conciliation. Non-performance of this obligation is liable to various sanctions. First, it can give rise to an award for damages and interest, as with any contractual non-performance. This sanction does not seem very widespread; comparative law shows that a procedural sanction is more common.

When the parties ignore the obligation to go to conciliation, the French courts refuse to acknowledge the dispute and declare that the claimant has no right to bring the action (fin de non reservoir).[15] *As for American courts, they enforce the clause in kind and send the parties back to the mediator or conciliator.*[16] *Such decisions, rendered in respect of traditional mediation or conciliation, are entirely transferable to online dispute resolution. Once the procedure is under way, the parties are only bound by a "duty of diligence", i.e. they must negotiate in good faith, but are not in any way bound to come to an agreement. In common law countries, the "duty of diligence" is known as the obligation to make "best efforts".*[17]

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15 In French law, the case of Polyclinique des fleurs, Cass. 2nd civ., July 6, 2000, note Jarrosson C, Revue de l'arbitrage [Arbitration Journal], 2001, p. 759; Revue trimestrielle de Droit civil [Quarterly Civil Law Journal], 2001. p. 359, obs. Jacques Mestre and Bertrand Fages.

16 In United States law, Hoertl Wolff Parker Inc. v. Howards Wright Construction Co, 1989, Dt Oregon, December 4, 1989, Westlaw, WL 151765, cited by Joëlle Thibault, Les procédures de règlement amiable des litiges au Canada [Procedures for Amicable Dispute Resolution in Canada], Montreal, Wilson and Lafleur, 2000, No. 54

17 Fontaine M, Droit des contrats internationaux: Analyse et rédaction des clauses [International Contract Law: Analysis and Drafting of Clauses], Paris, Forum européen de la communication[European Communication Forum], 1989, 368 p., especially «Best efforts, reasonable care, duediligence and règles de l'art», pp. 91-125.

When the parties see that the conciliation or mediation process is not heading for a successful outcome, they can stop it. Stopping the negotiations at this stage does not incur any sanction.

A ruling that the recalcitrant party will have to pay damages and interest requires proof, by citing specific conduct that it refused to negotiate in good faith. If the parties see the mediation or conciliation process through to the end, and make reciprocal concessions, a settlement agreement is recorded.

This has the effect of ending the dispute, with each party making specific undertakings that are binding. Their enforcement may subsequently be pursued before the State courts.

When mediation takes place entirely online, the settlement is recorded in an electronic agreement. It has to be confirmed that this electronic agreement is effective under common law. On the face of it, this does not appear to raise any difficulties, because of the universal trend towards accepting electronic documents[18].

As evidence (ad probationem) and as a condition for validity (advaliditatem). Moreover, in the absence of specific conditions regarding validity, the settlement agreement is subject to the rules of common contract law. [19]

(b) Arbitration

The decision to go to arbitration places greater constraints on the parties in Dispute, in terms of their conduct both during and after the electronic procedure.

The arbitral clause, by which the parties consent in advance to submit any dispute ، that arises to an arbitral tribunal، has a dual effect. The positive effect lies in according competence to the arbitrator or to the

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18 UNCITRAL Model Law on Electronic Commerce, available at: <http://www.uncitral.org>; Directive 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal of the European Communities, 17 May, 2000, L 178/1

19 Jarrosson C, «Les concessions réciproques dans la transaction», [Reciprocal Concessions in theDispute Settlement 12

arbitral tribunal appointed in the clause. According competence in this way also has the negative effect of rendering State courts incompetent.

Consequently, when the parties agree electronically to an arbitral clause, the validity of which is not contested, they cannot bring the dispute before a judge in their own country. Clicking to accept the electronic general conditions must therefore not be done lightly. That being the case, the co-contractors cannot choose not to take part in the arbitration just because the procedure is electronic.

If they refuse to appoint an arbitrator, to produce a statement of defense or to communicate electronic documents, the electronic procedure will go ahead without the defaulting party and an award may be rendered by default. If the electronic document fulfils the necessary conditions for the award to be rendered, it is binding on the parties. The party that wins can even demand ratification (exequatur) in the State of the losing party.

1.4 Conclusion

The drafter of an extra-judicial dispute settlement clause and the clients must carry out a thorough analysis of terms. The choice of the mediation, conciliation or arbitration clause defines their respective obligations during and after the electronic procedure. The online mediation or arbitration process, while appearing more innocuous and less formal, nonetheless places obligations on the parties that are sanctioned by law. Electronic mediation and conciliation fall entirely within the contractual field. It is the will of the parties that determines the form they take and the consent of the parties is sought when the settlement agreement is concluded. Once the principle of concluding contracts electronically is accepted, electronic mediation and conciliation do not raise any particular difficulty. Electronic arbitration, on the other hand, raises more of a problem because of the various demands imposed by national laws and international agreements. This is discussed in greater detail later in this module: section 2 discusses the formation of the electronic arbitration agreement, section 3, and the conduct of the online arbitration procedure and section 4 the efficacy of electronic arbitration. In all these cases, it needs to be established whether electronic arbitration satisfies the conditions of the law or of international agreements.

Part three

FORMATION OF THE ELECTRONIC ARBITRATION AGREEMENT

1.Introduction

Traditionally, the stipulation and acceptance of arbitral clauses are subject by law to conditions designed to protect the consent of the co-contractors. Indeed, in an arbitral clause, the parties undertake in advance to submit any dispute that arises to an arbitral tribunal. In so doing, they renounce the right to refer the dispute to State courts. The commitment should therefore not be taken lightly, nor imposed by the drafter of the contract. This being the case, any arbitral clause is subject to two conditions. First, it is necessary to confirm the consent of the party against whom the clause is invoked.

In general terms, consent to arbitration is often contested when the clause appears in the general provisions. Second it should be ensured that the requirements of form advaliditatem, prescribed by national laws and certain international conventions, have been properly observed. This second condition therefore relates to the form of the arbitration agreement.

In electronic commerce operations, the arbitral clause often appears in the general conditions that have been proposed and accepted by electronic means.

In checking the validity of the arbitral clause, therefore, two questions need to be addressed:

(i) Does the electronic contractual process really allow the informed consent of the parties to be obtained?

(ii) Does an arbitral clause posted on a computer screen, without a hard-copy contract, meet the formal requirements of a written? These questions are discussed in subsections 2.1 and 2.2 respectively .A further difficulty arises when the co-contractor is a consumer, as the consumer is protected by provisions of special law, the application of which is monitored by a judge. Acceptance of an arbitral clause, because it excludes the dispute from State courts, may therefore be taken to be a renunciation by the consumer of his/her rights before the dispute arises. That explains why the arbitrability of consumer disputes and the validity of arbitral clauses are sometimes contested. The question of arbitration

in consumer disputes is central in the electronic market, where operations often involve consumers. In subsection 2.3, we therefore look more closely at the arbitration of disputes arising from B2C operations.

2.1 Electronic Consent to Arbitration

The creation of an arbitration agreement in a contract concluded by electronic means raises two sets of difficulties. The first concerns the party that drafted the electronic contract: To what extent must that party ensure the accessibility of the arbitral clause and how should it organize the electronic contractual process? The second set of difficulties concerns the party accepting the electronic offer: How can it express its consent electronically?

2.1.1 Accessibility of the Arbitration Agreement

On the Internet, the communication protocol allows navigation from one file to another, particularly by hypertext links. Electronic documents are no longer presented sequentially; on the contrary, it is the user who takes the initiative in moving from one file to another. This method of organizing navigation by the designers of a site encourages what is known in legal terms as incorporation by reference. On the Internet, incorporation by reference of contractual conditions in the contract calls for particular precautions regarding accessibility of information.

(a) Incorporation by Reference

Traditionally, the technique of incorporation by reference is used so as not to lengthen the principal contract. Rather than reproduce pre-existing documents, the parties refer instead to a document accessible from elsewhere. For example, the general conditions are not included in the contract, but are available simply on request. Can an arbitration agreement that appears in a document to which reference has simply been made be invoked against the co-contractor?

Since the arbitral clause has the effect of depriving the co-contractor of access to the State courts, should it not be reproduced in the principal contract? In international trade law, the practice of incorporation by reference is currently allowed. French case law merely requires confirmation that the principal contract does contain a reference to the arbitral clause. Silence on the part of the receiving party regarding this reference implies acceptance.

In France, the Court of Cassation now takes an entirely consensual approach, since it does not even require that the reference to the arbitral clause be made "in writing".

> *"Whereas in matters of international arbitration, an arbitral clause is valid When incorporated by reference to a document mentioning it, as long as the Party against which it is invoked was aware of it at the moment the contract Was concluded and, even if through its silence, accepted this reference"*[20]

It is therefore sufficient that the accepting party be made aware of the arbitral clause, so that acceptance of the principal contract also implies acceptance of the arbitral clause. This case law is perfectly transposable to electronic commerce operations, in particular operations carried out on a web page, as the general conditions containing the arbitral clause are often accessible on a separate Web page through a hypertext link. Moreover, the UNCITRAL Model Law on Electronic Commerce enshrines incorporation by reference in its Article 5 bis, in the following form:

"Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message."

(b) Permanent Accessibility of Contractual Terms

Incorporation by reference depends on the actual accessibility of the arbitral clause: the co-contractor should have been able to access this external information, [21]failing which he cannot have given his consent. On the Internet and on electronic networks, the general conditions may be unavailable for technical reasons (e.g. the hypertext link may have been broken or the computer language may be illegible on the co-contractor's computer). There is thus a universal legislative trend towards provisions that explicitly require accessibility of the general conditions in electronic contracts.

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20 Cass. 1st civ., December 20, 2000, Prod export II, unpublished, cf. judgment Prod export I, Cass. 1st civ, June 3, 1997, Revue de l'arbitrage [Arbitration Journal] 1998, p. 537, note Xavier Boucobza in which the Court of Cassation still required «a written reference to the document» containing the clause

21 "Actual accessibility does not necessarily signify that the co-contractor has read the general conditions. This lack of diligence is then entirely imputable to him/her and he/she is deemed to have read those conditions

Article 10.3 of the Directive on Electronic Commerce stipulates that[22] *"Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them." In the United States, the Maryland legislator requires in the Uniform Computer Transactions Act that contractual term is available before and after the electronic conclusion of the contract.*[23] *The sanction for failing to comply with this requirement is that the inaccessible contractual terms may not be invoked.*

2.1.2 Electronic Expression of Consent

The client of an electronic commerce operator orders a corporeal or incorporeal asset on a website. The website operator has made it possible for him to access the general conditions where the arbitral clause appears.

How can the client express his consent to the electronic contract? In particular, does a click on the "I accept" button signify acceptance of the contract and the arbitral clause?

American case law generally views a click on the "I agree" button as sufficient for a contract to be formed. Thus in a decision in I. LAN systems, Inc. v. Net scout Service Level Corp 22 on 2 January 2002,[24]

The American judge decided that the user of a software program who, when downloading, had clicked on the. Agree" button at the bottom of the licensing contract, was bound by the contract. The judge in this case applied classical contract law, which authorizes the accepter to consent by means of actions specified in advance by the offerer.[25]

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22 Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, OLEC, July 17, 2000, L 178/1, Dalloz 2000, leg., p.133

23 Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, OLEC, July 17, 2000, L 178/1, Dalloz 2000, leg., p.133

24 I .LAN Systems, Inc. v. Net scout Service Level Corp, Civ. Act No. 00-11489-WGY (D. Mass., January 2, 2002).

25 Uniform Commercial Code, Section 2-204: «A contract for sale of goods may be made in a manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract .

In this instance, the click on the button represented the method of acceptance specified by the offerer. This principle is well established in American case law, particularly with regard to sales of software online. However, the "I accept" button must be visible, and the Internet user must be obliged to click on it to start the download.

Thus, in a decision in Specht v. Netscape Communications Corp,[26] *24 the Court decided that general conditions containing an arbitral clause could not be invoked against a user who had downloaded a piece of software. In this instance, the user was able to download the software directly by clicking on the "download" link, without having to click on the "I accept" button.*

This particular button expressing agreement to the general conditions was even relegated to the bottom of the Web page, in a place that the user might not find. In summary, a click does not signify acceptance unless it is linked explicitly to the general conditions. A click that simply starts the download without any other reference is therefore considered inoperative.

Finally, we need to determine whether the arbitral clause should be specifically highlighted among the general conditions. In one case - Lieschke, Jackson & Simon v. Real networks Inc- the claimants maintained that they had not been able to consent to an arbitral clause buried among the general conditions posted on the computer screen.[27]

The judge found that while the clause was not specifically highlighted under the heading "arbitration agreement", it was nonetheless perceptible. It was in the same font as the rest of the agreement, in a position that attracted attention. This decision relating to the downloading of software was in line with traditional case law regarding general conditions. The balance of case law allows the following recommendations to be formulated on the drafting and presentation of general conditions in electronic channels:

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26 Specht v. Netscape Communications Corp., 2001 WL 755396, 150 F. Supp. 2d 585 (S.D.N.Y., July 5, 2001).

27 United States District Court, Northern District of Illinois, Eastern Division, May 11, 2000, Lieschke, Jackson & Simon v. Real networks Inc, 2000 WL 631341. See below, in subsection 2.2.2(b)

(i) The website operator must ensure that the co-contractor is routed through the general conditions, or at least must make a very explicit reference to them, before the contract is concluded.

(ii) The general conditions must be easily accessible, before and after the conclusion of the contract. It is desirable that the general conditions be automatically downloaded onto the hard disk of the user's computer so that they can be filed.

(iii) The arbitral clause must not be hidden away within the general conditions. On the contrary, it must be clearly highlighted .The addition of a heading and bold type, though not mandatory, does seem preferable.

(iv) The "I accept" button only binds the user when he/she closes the contractual procedure, after having viewed the general conditions.

2.2 Electronic Form of the Arbitration Agreement

The party invoking the arbitration agreement must provide evidence of its Existence. The presentation of a written document will certainly convince the arbitrator who is called to rule on his/her jurisdiction. Other means of proof may, however, be admitted by the judge or arbitrator who is asked to rule on the existence of the arbitration agreement.

Beyond this question of proof, it is important to determine whether the validity of the arbitration agreement is conditional on there being a written document.[28] In other words, is the penalty for the lack of a written document the invalidity of the arbitration agreement?[29]

(When a written document is demanded on pain of invalidity, is it still possible to stipulate an arbitration agreement electronically?

The validity of the electronic arbitration agreement must first be assessed from the point of view of international agreements setting out the material Rules relating to arbitration.

It is by no means sure that these international Agreements can be interpreted as favoring electronic documents, since the agreements were adopted almost 50 years ago, at a time when the drafters could not

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28 See below, section 3.2.

29 Fouchard P, Gaillard E and Goldman B. On International Commercial Arbitration, no 590.

foresee that a written document could take other than a physical form. The legal systems in some countries still require a written document advaliditatem.

Arbitration law must therefore be adapted to electronic commerce by legislation or by application of case law. Finally, the link between the New York Convention and national provisions that are more favour able to electronic documents must be specified.

2.2.1 Requirements of International Agreements:

Document

Signed by the Parties The New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards has enjoyed worldwide success, with over 100 States having ratified or signed up to it.[30]

Its range of application is very broad, since it only requires one Party to seek ratification of the award before the courts of a contracting State for the Convention to be applicable. The main objective of the Convention is to determine the conditions for awards to be recognized and enforced. Article II is concerned specifically with the conditions regarding the form of the arbitration agreement:

Article II of the New York Convention"

1. Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractua1 or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a Contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

Article II can be adapted to electronic exchanges in a variety of ways, depending on the contractual process adopted by the parties. If the parties conclude the contract by an exchange of electronic mails, Article

30 As of April 2002, 129 States had ratified the New York Convention.

II (2) can be interpreted by analogy in fine. The signature of the parties is not required when the agreement is "contained in an exchange of letters or telegrams". Also, case law has accepted that faxed copies and telexes are comparable to letters and telegrams. [31] *It is therefore reasonable to argue that an arbitration agreement is a written agreement when it is contained within an exchange of e-mails.*[32]

Of course، there is a greater risk of fraud with e-mails than with telegrams or telexes. The argument is, however, not persuasive, because security procedures (encryption, intervention of a third-party certification body) can give the email an equivalent degree of security.

In more general terms, hard-copy documents can also be subject to fraud. This risk cannot therefore be put forward as an argument against granting the status of written agreement to an arbitration agreement stipulated and accepted by e-mail. Is the same true when the contract is concluded on a website that invites the user to fill out an electronic form and to click on the "I accept" button?

It could be argued that if the clause appears in an electronic contract, it has not been signed by the parties, as required by the first alternative in Article II (2).

In reality, the acceptance of the electronic signature in different legal systems by adoption of the UNCITRAL Model Law on Electronic Signatures or by transposition of Directive 1999/93/EC on Electronic Signatures leads to the conclusion that the clause is valid as long as the signature processes are secure.

In any event, the conclusion that such a clause is valid can also be reached by applying the second alternative in Article II(2), namely that acceptance of an offer on a website constitutes an exchange of data comparable to the exchange of letters or telegrams .[33]

To increase legal safeguards and encourage a uniform interpretation of the New York Convention, UNCITRAL sees two possibilities. The first is to propose an interpretative instrument relating to the Convention, and thereby avoid the need for a revision of the text. UNCITRAL would

31 Paris, 20 January 1984, Revue de l'arbitrage [Arbitration Journal], 1987, p. 482 , C. Kessedjian

32 Arsic J, International Commercial Arbitration on the Internet – Has the future come too early? Journal of International Arbitration, 1997, p. 209-221; Hill R, New paths for dispute resolution, in Improving International Arbitration, Liber amicorum Michel Gaudet, Paris, ICC publishing, 1998, p. 64.

33 Hill R, op. cit.

recommend that the definition of the term "agreement in writing" be interpreted so as to include electronic processes.[34]

This interpretative instrument would be based on the revised version of the UNCITRAL Model Law on International Commercial Arbitration. Article 7 of this model law, which has been the inspiration for many national legislators, will soon be adapted to cover explicitly the electronic document, as defined in the Model Law on Electronic Commerce. Art. 7 "2) the arbitration agreement shall be in writing. "Writing" includes Any form that provides a [tangible] record of the agreement or is [otherwise] accessible as a data message so as to be usable for subsequent reference" The drawback of an interpretative instrument relating to the New York Convention, even one based on the revised version of the Model Law on International Commercial Arbitration, is that it is optional; it would therefore only be of indicative value to judges and arbitrators.[35]

That is why UNCITRAL envisages the adoption of a subsidiary protocol in addition to the New York Convention.

The Geneva Convention of April 21, 1961 is a regional agreement that binds mainly European States. This convention has a broader scope than the New York Convention and is even more favorable to arbitration. Article 1.2(a) defines the arbitration agreement as: [36]

> *"Either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter"*

This material regulation relating to the form of the arbitration agreement resembles that set out in the New York Convention, with the additional mention of communications by teleprinter. Although the reference is to out-of-date technology, the mention of the teleprinter certainly encourages an interpretation favorable to arbitration agreements concluded electronically. Moreover, according to expert opinion, it "should be interpreted as liberally as the New York Convention". [37]

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34 UNCITRAL, «Preparation of uniform provisions on written form for arbitration agreements», February 6, 2002, A/CN.9/WG.II/WP.118.
35 Ibid, section 30.

36 On this Convention see Fouchard P, Gaillard E and Goldman B, On Commercial International Arbitration, No. 274 ff.
37 Fouchard P, Gaillard E and Goldman B, op. cit ., No. 622.

2.2.2 Requirements of National Laws

National legal systems have adopted different regulations concerning the form of the arbitration agreement. Some systems take a consensual approach, which is not subject to any conditions regarding form. Conversely, other systems adopt a more formalized approach, requiring the stipulation of an agreement in writing. In these systems, an electronic document is acceptable to legislators and in case law (see below). In any case, the validity of the arbitration agreement is not subject to the conflict-of-laws method, but is assessed directly according to the material regulations available to the judge considering the matter.

(a) Flexibility of the Consensual Approach

French law on international commercial arbitration provides a good illustration of the consensual approach to an arbitration agreement. The provisions of the new Civil Procedure Code on international arbitration do not specify any requirement of form, or even of evidence. [38]

French case law has concluded that the existence and enforceability of the clause

> *"Are assessed according to the mandatory regulations of French law and of International public order, in accordance with the common will of the parties, without the need to refer to a State law".*

This constitutes a material regulation under the French law on international arbitration, which means that the judge does not have to decide the law applicable to the arbitration agreement. The judge merely has to demonstrate the consent of the parties, [39] *which need not necessarily be expressed in writing. In these conditions, a click indicating acceptance of an electronic arbitration agreement constitutes sufficient expression of consent. It is not necessary to determine whether the electronic document should be considered a written document or not. This system is preferable to that that which requires, on pain of invalidity, that the arbitration agreement be stipulated in writing.*

(b) Adaptation of Formalized Requirements

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38 Book IV, chapter V of the New Civil Procedure Code

39 Cass. Com, December 20, 1993, Dalico, Revue de l'arbitrage [Arbitration Journal] 1993, p. 116, note Hélène Gaudemet-Tallon; Civ., June 3, 1997, Prodexport, Revue de l'arbitrage [Arbitration Journal] 1998, p. 537, note Xavier Boucobza

French law is less liberal with regard to domestic arbitration, [40]*since it demands, on pain of invalidity, that the arbitral clause be stipulated in writing. The United States Federal Arbitration Act, Article II also requires that the arbitration agreement be stipulated in writing*

> *" an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" .*[41]

On the basis of these texts, the validity of electronic arbitration agreements is not clear, since the letter of the law does not explicitly mention electronic methods of communication, as is sometimes the case. In Switzerland, on the other hand, Article 178 of the Federal Law on International Private Law adopts wording that explicitly specifies the means of communication:

> *"As for the form, the arbitration agreement is valid if it is made in writing, by telegram, telex, teleprinter or any other means of communication that can be proven by a written text."*

In the absence of such a clear formulation, the legislator or judge has to adapt texts requiring the stipulation of the arbitration agreement in writing. The intervention of the legislator is the first means of adapting the law to new technologies. In France, an Information Society Bill will soon include electronic written evidence ad validitatem:

"When a written document is required to confirm the validity of a legal act, it may be drawn up and preserved in electronic form as provided for in articles 1316-1 and 1316-4". [42]

The conditions of Article 1443 of the new Civil Procedure Code would then be fulfilled by an electronic document, making electronic arbitration agreements valid in domestic arbitration. In the United States, the arbitration law adopted in each state should also be adapted following

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40 French arbitration law is a twin-track law that distinguishes between domestic and international arbitration. International arbitration is that which deals with international commerce (see Article 1492 of the New Civil Procedure Code, which defines international arbitration). In twin-track systems, arbitration would have to be designated as either domestic or international in order to determine the applicable regime
41 Article 1443 of the New Civil Procedure Code.

42 See the commentary in the Information Society Bill by the Chamber of Commerce and Industry of Paris, 18 October 2001, available on the Internet at: <http://www.ccip.fr>.

the revision of the model law on arbitration - the Uniform Arbitration Act. The revision of this model law, adopted on 28 August 2000, 41 should be the basis for United States state legislators. Article VI of the Revised Uniform Arbitration Act enshrines the validity of arbitration agreements, as long as they appear in a document.[43] Article I(6) allows for documents in an electronic format when the information stored is accessible in an intelligible form:

> *"Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.*

The second means of adapting the law to new technology is for the judge to interpret legislative texts on arbitration. This is preferable because it saves going through a sometimes lengthy legislative process.

Thus in the United States the federal judge, interpreting the text, can specify the conditions under which an electronic arbitration agreement constitutes a document under Article II of the Federal Arbitration Act. Lieschke, Jackson & Simon vs. Realnetworks concerned a dispute over the downloading of free software on the Internet.[44]
The users of the software accused the publisher of invasion of privacy and of allowing access to their personal data through a lack of security that made their electronic communications vulnerable.
They therefore sought to obtain redress before the United States courts for the damage caused. The publisher of the software countered, pointing out the general conditions to which they had agreed before downloading the software.
These conditions did indeed contain an arbitral clause that deprived the State courts of their competence to hear the dispute. The claimants, in order to avoid arbitration, contested the validity of the arbitral clause, arguing that it was not a clause stipulated "in writing" under the terms of the Federal Arbitration Act.

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43 Revised Uniform Arbitration Act, 28 August 2000, available on the Internet at:, <http:// www.law.gmu.edu/drc/UAA.2000.htm>; Lurie, P-M, «Recent Revisions to the Uniform Arbitration Act in the United States», Journal of International Arbitration, April 2001, vol. 18, no. 2, p. 223. which an electronic arbitration agreement constitutes a document under Article II of the Federal Arbitration Act. Lieschke, Jackson & Simon vs. Real networks,

44 United States District Court, Northern District of Illinois, Eastern Division, 11 May 2000, Lieschke, Jackson & Simon vs. Real networks Inc., Yearbook, vol. XXV, 2000, p. 530 and the commentary on the decision, Cachard O, «La validité des conventions électroniques d'arbitrage en droit des Etats-Unis»[The validity of electronic arbitration agreements in United States law], Revue de l'arbitrage [Arbitration Journal], 2002, vol. 1., p. 193-20

In a decision of 11 May 2000, the chief federal judge decided, however, that an arbitration agreement stipulated electronically did constitute an agreement "in writing" under Article II of the Federal Arbitration Act. On the one hand, in the absence of a definition of a document in federal arbitration law, the commonly accepted meaning of the term "in writing" has to be used, which does not exclude electronic messages. Even in 1925, a document was not necessarily confined to symbols inscribed on a physical medium.
On the other hand, the licensing contract, communicated electronically when the software was downloaded, could easily be printed and automatically kept safe on the user's computer. It would therefore be filed and available at any time, just like a hard-copy contract. Some weeks after this decision, Congress adopted a Federal law concerning the validity of electronic documents: Electronic Signatures in Global and National Commerce Act.[45]

In conclusion, national legal systems generally favour the validity of the arbitration agreement concluded electronically, whether through a consensual or formalized approach. In the latter case, the legislative trend in favour of the electronic document and the authority of the judge suggest that the law should be adapted to electronic commerce.

2.2.3 Link between the New York Convention and More Favorable National Provisions

A study of positive law has revealed that the New York Convention and national laws stipulate different levels of requirement regarding, in particular, the form of an arbitration agreement. French law on international commercial arbitration, for example, does not impose any condition of form on the arbitration agreement, whereas Article II of the New York Convention mentions an "agreement in writing".

Which provisions take precedence when a State, such as France, is a party to the New York Convention? The answer is to be found in Article VII of the Convention, which provides as follows:

> *"The provisions of the present Convention (...) shall not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent*

45 The E-Sign Act came into force in two stages: on 1 October 2000, for the majority of its provisions, and on 1 March for the provisions relating to electronic filing (15 USC 7001-7006). See in particular Article 101.

allowed by the law or the treaties of the country where such award is sought to be relied upon."

This Article shows that the Convention, intended to favour the circulation of awards, only does so to a minimal degree.

The judge should therefore give precedence to the more favorable national provisions. Can the requirement for a written agreement set down in Article II therefore be dispensed with because the national law only requires the judge to verify the existence of consent?

As an UNCITRAL working group points out, a position must be taken on the scope of the regulations in Article II, in order to determine whether it can be superseded by a more favorable law using the mechanism of Article VII. Does Article II establish a maximum requirement of form that allows for dispensations, or rather a unified requirement of form that does not? [46]*To date, the majority view does not seem to favour dismissing the requirements of Article II.* [47]

2.3 Arbitration in Consumer Disputes

There is no uniform definition of consumer; each State and each international agreement has its own criteria. It is therefore necessary to confirm whether the criteria for applying the text in question are fulfilled. Generally, the consumer often seems to be a subject in law that merits particular protection by reason of his/ her supposed weakness. In essence, the category of "consumer" indeed signifies a natural person who contracts for his/her personal use. [48] *Of course, the Internet reduces the imbalance between consumers and businesses, for example by facilitating price comparisons using intelligent agents.*

The need to confer an equal level of protection online and offline is, however, generally agreed. Arbitration may represent a threat to the

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46 UNCITRAL, Preparation of uniform provisions on written form for arbitration agreements, A/CN.9/ WG.II/WP.118.

47 Fouchard P, Gaillard E and Goldman B, On Commercial International Arbitration, no. 271, on the grounds that Article II deals with the arbitration agreement itself, «separate from any proceedings concerning the recognition and enforcement of the decision»; and is sceptical about dismissing the requirements of Article II, A/CN.9/WG.II/WP.118

48 UNCTAD, E-Commerce and Development Report 2001, p. 110, UNCTAD/STDE/ECB/1.

consumer, especially if the costs of arbitration are high. Will the arbitrator apply the mandatory provisions protecting the consumer?

As a rule, these considerations are not an obstacle to the arbitrability of consumer disputes (see subsection 2.3.1 below). They do, however, have an impact on the validity of arbitral clauses and require specific precautions (see subsection 2.3.2 below).

2.3.1 Arbitrability of Consumer Disputes

For the arbitration agreement to be valid, it must relate to a matter that can be settled by arbitration. This concerns the arbitrability ratione materiae of consumer disputes. A quick review of comparative law shows that just because consumer protection regulations are applicable, that is not sufficient to render the dispute unarbitrable. In fact, the arbitrator may apply policing laws and ensure that principles of public order are observed.

Thus in Hill v. Gateway 2000 Inc, a federal court set aside the claim of inhabitability of a consumer dispute.[49] In the case in point, some consumers had purchased, through a remote sales contract, a computer that was unsatisfactory.

The general conditions, contained in the package, stipulated that if the goods were not returned within 30 days, the consumers would be deemed to have accepted the contractual terms. These contractual terms contained an arbitration clause of the International Chamber of Commerce (ICC).

The customers, who wished to block the arbitration clause, maintained that the applicability of a federal text, the RICO Act, rendered the dispute ineligible for arbitration. The decision to reject their application is in line with well-established case law. The protection of the consumer against the dangers of arbitration, in particular its high cost, must follow other courses than the systematic challenging of the validity of the clause. In another case involving Gateway 2000,[50] the judge decided that the

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49 Hill v. Gateway 2000, Inc., 105 F.3d 1147)Cir. 1997 ،(particularly p. 1141

Day Brower v. Gateway 2000 Inc ،.246 A.2d 246 (NY App .1998

50Paris, January 7, 1994, Revue de l'arbitrage [Arbitration Journal], 1996, p. 72, note Charles Jarrosson; see the decision to reject the appeal against this decision, Cass. 1st civ., 21 May 1997, Méglio v. Sté V 2000, Revue critique de droit international privé [Critical Review of International Private Law], 1997, p. 504, note V. Heuzé.

dispute was arbitrable, but that the clause appointing the ICC placed an excessive burden on the consumer. He therefore ordered that the arbitration take place before another arbitral institution, where the procedure was less costly.

In French law, the arbitrability of consumer disputes is also admissible in international arbitration, when the arbitration "calls into play the interests of international commerce." The Court of Paris recognized, in a case involving the automobile firm, Jaguar, that

> *"the competence of the arbitrators is not ruled out purely because a mandatory regulation is applicable to the legal relationship in dispute, and because they have the power to apply principles arising from this regulation and to sanction their refusal to take it into consideration, under the supervision of the judge who set it aside."*[51]

In this case, a dispute arose between a collector and a seller of restored prestige cars. Where domestic arbitration is concerned, however, the arbitrability of consumer disputes is more contested and requires a more detailed analysis.

2.3.2 Validity of the Arbitral Clause

The acceptance of the arbitrability of consumer disputes does not prejudice the validity of the clause attributing competence to the arbitrators. There are in fact two types of arbitration agreement, depending on when the clause was concluded. When the arbitral clause is concluded before the dispute arises, it covers any dispute that might occur. It leads the consumer to renounce, in advance, the guarantees offered by State courts. That explains why arbitral clauses are viewed with disfavor in some legal systems, because they imply a renunciation by the consumer of his/her own rights. This being the case, even if the matter is arbitrable, the arbitral clause cannot be invoked against the consumer. Conversely, if the arbitration agreement is concluded after the dispute has arisen, it gives the consumer the choice of going to arbitration in preference to going before the State courts. The disadvantage of this type

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51 On this question, see Loquin E, "L'arbitrage des litiges du droit de la consommation" [Arbitration of Consumer Law Disputes], in Osman F, Vers un code européen de la consummation [Towards a European Consumer Code], Brussels, Bryant, 1998, p. 360. 5.9

of arbitration agreement is that either party may refuse to go to arbitration when a dispute arises.

Therefore, electronic commerce operators, to be certain of the efficacy of the arbitration agreements they stipulate, must give the consumer the choice of whether to go to arbitration, a choice that the consumer will make when the dispute arises. To offer this choice, there are two ways in which the agreement can be drafted, while demonstrating the commitment of the operator to submit to arbitration.

The first is for the operator to make a unilateral commitment to submit to arbitration. The experimental Cyber tribunal (1) site offered this solution to electronic commerce operators who wanted to benefit from using its label.[52]

The commitment was drafted as follows:

"[Name of business, organization, body], undertakes to submit to the process [53]s of mediation and arbitration of the Cyber tribunal any dispute arising in the course of our commercial electronic activities with a client rather than refer the matter to a court of law. For further information on online mediation and Arbitration, visit the Cyber tribunal site at http://www.cybertribunal.org."

This is not however a very safe solution for the consumer, since it is not a Contract between the two parties. The scope of the unilateral commitment is Uncertain in civil law, especially when it is expressed in an ambiguous way.

The second, safer, technique, is that of the optional clause, whereby the business gives the consumer a choice between the courses available to him by law and by mediation or arbitration. Unlike the unilateral commitment, the option given to the consumer here has the force of a contractual stipulation linking the two co-contractors. This is the solution used in the United Kingdom by a site selling motor vehicles

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52 Caprioli EA, "Arbitrage et médiation dans le commerce électronique (L'expérience du "Cyber tribunal")", [Arbitration and Mediation in Electronic Commerce (The Experience of the "Cyber tribunal"] Revue de l'arbitrage [Arbitration Journal], 1999, p. 226.

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online.)[54] "Any dispute you may have with Ford arising out of or in connection with this contract shall be resolved in one of two ways, either

(i) it may be referred to arbitration under the Chartered Institute of Arbitrators, 'The Rules of the Independent Dispute Resolution Service for Purchasers from Ford Journey' (the 'Rules'), which Rules can be accessed via the Chartered Institute of Arbitrators web site (www.arbitrators.org) or by phoning 0207 8374483. Any arbitration award shall be final and binding, save where the arbitration award is against you in which case you will be entitled to pursue your claim as set out at (ii).

However, any dispute shall first have been referred to the Ford Journey office, or (ii) by proceedings, if you are a resident of the European Union (EU), in your home EU courts subject to your home EU laws, or if you are not a resident of the EU in the English courts subject to English Law.

" The validity of these optional clauses is accepted in French law and in English law, as long as the option is offered explicitly.

Part 4

ELECTRONIC ARBITRATION PROCEDURE

1. Introduction

First and foremost, the Internet and information technology have a practical Impact on dispute resolution procedures: documents are transmitted instantaneously to the arbitrators at a modest cost, and the parties avoid Incurring travel costs. For the arbitrators themselves, electronic documents Present significant advantages, particularly when the parties' submissions are Large, because they can do a keyword search without having to review the entire file. Also, arbitrators are already using new technology widely.

In Addition to this daily use of information technology (IT) equipment, the Internet has had a profound impact on dispute resolution procedures. Although alternative dispute resolution traditionally relied on interviews and meetings between the litigants and the arbitrator or mediator, the

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54 Ford, available on the Internet at: <http://www.fordjourney.com>.

Internet now encourages remote dispute resolution. Physical meetings have thus been replaced by electronic exchanges.

This total or partial elimination of the physical meetings between the litigants and the third parties they have chosen to resolve their dispute is a feature of electronic procedures. By the same token, the use of the Internet and IT leads to the replacement of traditional documents and written evidence by electronic documents and written evidence. The electronic procedure can therefore be organized using a variety of models, involving the complete or partial elimination of hard-copy documents.

An electronic arbitration procedure, although having to be organized in a particular way because of the use of technology, is nonetheless still subject to the principles that traditionally govern any arbitration case. A study of comparative arbitration law shows a convergence of the general principles governing arbitration procedure in the various legal systems. There are two commonly accepted principles that are relevant in particular to electronic Arbitration procedures. The principle of procedural autonomy allows the parties to organize the arbitral procedure. In general, when it is a case of an institutional arbitration, it is the arbitrator who organizes the procedure in accordance with the arbitration rules to which the parties have agreed.

The principle of procedural autonomy therefore leaves it to the parties and the arbitral institutions to adapt the procedure to the electronic arena. Electronic cases are admissible when there is contractual freedom. Nevertheless, contractual freedom cannot undermine the mandatory regulations that govern the arbitration procedure. Among these mandatory regulations, those resulting from the due process of law are of particular relevance.

The arbitration proceedings must always respect the impartiality of the tribunal, the equality of the parties and the principle of contradiction. An electronic procedure organized without due care could fail to recognize these principles. For example, unequal electronic access of the parties to the website of the institution could undermine the principle of equality or contradiction.

When the electronic procedure is organized in accordance with the principles of good justice, additional precautions still need to be taken in electronic commerce disputes to preserve the rights of the parties. The outcome of the arbitration depends on the supporting evidence produced

by the parties. This evidence is what will determine the arbitrator's decision.

On the Internet, the question of evidence raises specific questions because of the risk of fraud and alteration of data files.

How can evidence of an electronic act be provided? What can the arbitrator do if the authenticity of a document is contested? Inshore, there is a risk that electronic commerce may encourage disputes over evidence to arise within the arbitral proceedings. Subsection 3.1 describes the conduct of electronic proceedings before looking at the particular question of administration of electronic evidence in the subsequent subsection.

3.2 Conduct of Electronic Proceedings

The various stages of the electronic proceedings can be organized by electronic means. However, it is important to make sure that the principles of good justice are not adversely affected by electronic exchanges.

3.2.1 Stages of Electronic Proceedings

In this subsection, we look at the major stages of the proceedings in turn, from initial submission to deliberation and rendering of the award.

(a) Initiation of Electronic Proceedings

When a disagreement between parties that have stipulated an arbitration Agreement cannot be resolved; it is up to the claimant to refer the matter to the arbitral tribunal. This referral can be drawn up and sent electronically. Secure electronic signature technology allows the arbitral tribunal to be certain that the referral e-mail is indeed sent by the person claiming to be the author.

The arbitral institution then informs the respondent of the existence of the proceedings by e-mail. The referral by the claimant and the notification to the respondent can perfectly well be done by e-mail if the arbitration rules to which the litigants have signed up so provide. In the case of ad hoc arbitration, the claimant would have to notify the respondent that it is incumbent upon him/her to appoint an arbitrator.

At this stage, the electronic proceedings are under way. The litigants are then able to exchange their conclusions and arguments in electronic written statements.

(b) Electronic Request for Arbitration

The Request for Arbitration sets out the claims of the parties and the question sat issue for the arbitral tribunal to resolve. It also defines the main rules that will govern the arbitration procedure. In principle, it should bear the signature of the arbitrators and the parties. It can be of particular use in electronic Procedures when the arbitration rules do not specifically deal with certain Questions.[55] The parties could use the Request for Arbitration to agree to Exchange documents electronically or even to decide on the seat of the Electronic arbitration.[56]

(c) Production of Written Statements and Documents

At this stage, the litigants must produce their written statements and documents, which they address to the arbitrator and to the adverse party in order to respect the principle of contradiction.

In electronic commerce disputes arising out of an electronic contract, the parties are able to produce and exchange exclusively electronic documents in the form of files attached to e-mails.

For example, Article 3(2) of the ICC Rules authorizes electronic communication with the Court and the Secretariat. However, physical documents may be necessary in support of an argument. For example, one party may produce a bailiff's affidavit.

In many States, the law has not yet put in place procedures for rendering into electronic format authentic acts drawn up by ministerial officers. The litigant will therefore use the postal service.

(d) Absence of Electronic Hearings

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55 Huet J and Valmachino S, "Réflexions sur l'arbitrage électronique dans le commerce international"["Observations on electronic arbitration in international commerce"], LaGazette du Palais, January9-11, 2000, p. 14

56 See below, subsection 4.1.2

The organization of electronic hearings is technically possible, but it involves considerable technical resources, which are currently accessible only at a high cost. Some experimental projects have been undertaken in the United States by state courts, using specially prepared rooms. In the short and medium term, electronic arbitration will have to do without actual electronic hearings between absent persons if costs are to be kept under control. Are arbitral proceedings possible without a hearing that brings together the parties and their legal representatives? They are possible; the United Kingdom has for a long time recognized "documents-only arbitration", requiring no hearing. The absence of a hearing does, however, make the procedure more difficult to administer in three respects.[57]

First of all, procedural hearings, which generally take place before State courts, often allow a simple verbal resolution of questions relating to the presentation of documents. In this situation, there is an exchange of electronic mails, ensuring that the principle of contradiction is respected. Secondly, the absence of a hearing also seems to compromise the hearing of Witnesses' statements and expert opinions by the arbitral tribunal. Here again, the obstacle is not insurmountable.

The use of testimonial evidence is not universal; it is mainly favored in countries that have adopted common law, where there is direct examination and cross-examination of witnesses.

Moreover, testimony can be received in writing, or in this case, by a written Electronic message. Some Anglo-Saxon institutions that propose electronic Arbitration nonetheless require hearings. These are physical hearings that could be very costly in international arbitration cases. Lastly, the absence of a "statement of defense" hearing is certainly the most unique aspect of electronic arbitration.[58]

Of course, "statement of defense" hearings are not a necessity, and it is acceptable for the parties to confine themselves to a written procedure.[59] *However, such hearings do allow the parties and their legal representatives to order their arguments and to put forward the most salient points.*

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57 See below, subsection 3.1.2 (a).

58 http://www.webdispute.com

59 Paris June 21, 1990, Revue de l'arbitrage [Arbitration Journal], 1991, p. 96, note J-L Delvolvé, regarding ICC arbitration

An exclusively written procedure risks presenting the arbitrator with very long written statements and subsidiary arguments that could be difficult to prioritize.

(e) Online Deliberation

At the end of the procedure, provision has to be made for electronic deliberation when the arbitral tribunal is composed of arbitrators based in different States. Modern texts on arbitration law do not preclude electronic deliberation, since they do not stipulate the form of the deliberation.[60] Arbitral practice already allows for deliberation by telephone, fax and even videoconference.

(f) Notification and Filing of Award

An electronic award raises several issues. The question of whether an electronic document satisfies the requirements of form lay down by the law and by international agreements, is discussed later in subsection 4.2. Here we focus on the arbitration procedure itself. In this context, it is necessary to determine the obligations of the arbitral institution. Awards, such as court judgments, must be notified to the parties.

This could be done by publishing the award on the website of the arbitral institution, on condition that this does not affect the confidentiality of the arbitration. The rules of the Cyber tribunal and of the World Intellectual Property Organization (WIPO) provide for the publication of the award on the website of the case at hand within 60 days of its delivery. The site of the case at hand must only be accessible to the parties to the dispute, so as to safeguard the confidentiality of the award. Placing the award online in this way is certainly not sufficient to satisfy the demands of arbitration laws that require the text of the award to be notified or for the award to be sent to the parties[(61]

It is certainly more prudent, in addition to placing the award online, to send a secure e-mail with acknowledgement of receipt, or even to send a hard-copy version of the award by registered mail. A hard-copy version

60 Fouchard P, Gaillard E and Goldman B, On International Commercial Arbitration, No 1372, cite French law and Italian law, which explicitly allow for deliberation by video telephony

61 Huet J and Valmachino S, "Réflexions sur l'arbitrage électronique dans le commerce international"[Observations on Electronic Arbitration in International Commerce], Gazette du Palais, January 9- 11, 2000, p. 6 ff., quoting Article 31 (4) of the UNCITRAL Model Law of June 21, 1985

of the award is also necessary to enable the arbitral Institutions to keep and archive awards.

The constant evolution of technical standards in the area of computer archiving platforms is a threat to this activity in the long term. In these circumstances, such a well-known arbitral institution as the ICC has chosen to continue to archive awards in hard copy, even when arbitration is electronic.

3.2.2 Principles Governing Electronic Proceedings

Electronic arbitral proceedings are subject to the principles of good justice that govern any arbitral proceedings. However, electronic participation of the parties in the procedure and the rapid circulation of information require Particular care to ensure that two well-established principles are not undermined.

The principle of contradiction may not be observed if the use of computer resources is unequal. And the speed of electronic circulation of the data in the dispute threatens the confidentiality of the arbitration. The arbitral institution and the parties must therefore ensure that these principles are respected.

(a) Principle of Contradiction

The principle of contradiction is defined differently in different national Systems.[62] *It covers what common law professionals refer to as due process of law. The parties must be in a position to present their arguments on equal Terms. Electronic arbitration threatens this equal treatment of the parties at various stages of the proceedings.*

Respect for the principle of contradiction implies that the parties have equal access to documents. Electronic documents sent by one of the parties to the arbitrator should therefore be sent to the other party, either directly or via the arbitral institution.

Secondly, written statements must be exchanged within a strict framework so as to respect the equality of the parties. Traditionally, the parties present their statements of reply (and counterclaim) to the arguments of the adverse party. There is therefore a real debate between the parties, assisted by their legal representatives. However electronic

[62] *Fouchard P, Gaillard G and Goldman B, On International Commercial Arbitration, no. 1*

cases are limited to a short period, and sometimes only allow for a single exchange of written statements.

When one party fails to recognize the arbitration rules and submits a reply when this should not have been done, the arbitral tribunal must disregard the arguments presented in this reply. If these arguments are not ignored, he/she would be favoring one party.

There must also be a ban on exchanges ex parte (caucuses) between a litigant and the arbitrator. These are a feature of mediation and conciliation, but they are not allowed in cases of arbitration. It is therefore not desirable to substitute a sequence of e-mail exchanges for the classic arbitration hearings.

At the least, a copy of the e-mails exchanged between the arbitrator and one of the parties should be sent to the other party. Technically, a better solution is for the arbitrator and the parties to meet in a "chat room". This makes the exchanges simultaneous, rather than successive, thus respecting the principle of contradiction.

Organizing video conferences raises other problems. Exchanges are of course simultaneous, so the principle of contradiction appears to be respected.[63] However, the parties must have exactly the same technical capabilities and the same quality of connection.

If the quality of communications is poorer for one of the parties, that party is disadvantaged in the presentation of its arguments during the electronic hearing. Some purely factual details, such as the focusing of the web camera (web cam), can also affect the arbitrator's perception of the arguments of one or other of the parties.

If the Webcamfocuses on the face of one of the legal representatives, it can highlight in an exaggerated way the body language of a litigant and cast doubt on the sincerity of his/her arguments. Some United States observers have expressed concern that the due process of law is called into question whenever the conditions of camera positioning and transmission are not exactly identical.

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63 Several online arbitral institutions offer videoconferencing facilities, e.g. MARS, Nova forum, Web dispute Resolution

These conditions can only be identical if the statements of defense and the statements of claim are made from identical electronic hearing rooms. It is hard to imagine in the short term that each party will use its own video equipment to participate in electronic hearings. At the least, a standard protocol needs to be adopted governing electronic hearings in the finest detail.

(b) Confidentiality in Electronic Arbitration

The principle of confidentiality in the arbitration procedure is generally considered to be an aspect of international arbitration. Confidentiality is presented as a decisive factor in opting for this alternative method of dispute resolution in preference to State justice. In certain States, such as the United Kingdom and France, case law explicitly enshrines the confidential character of the arbitration procedure.[64]

When this is not the case the obligation of confidentiality is based on other factors, [65]*such as acceptance by the parties of arbitration rules that ensure confidentiality or the express agreement of the parties to ensure confidentiality of the arbitration.*

The reach of the obligation of confidentiality is fairly broad, covering both the parties and the arbitral institution. First and foremost, it concerns all the documents and information submitted by the parties during the electronic procedure. These must not in any circumstances be disclosed to third parties. When the award is made by an arbitral tribunal, the panel's deliberations must remain confidential, and must not be disclosed to either the parties or the secretariat of the arbitral institution. [66]*Finally, the obligation of confidentiality covers the award made by the arbitral tribunal; it may only be made public with the express consent of the parties.*

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64 In the United Kingdom, enshrining the requirement of confidentiality, Ali Shipping Corporation v.Shipyard Trogir, Court of Appeal, Civil Division, 19 December 1997, [1998], All England Law Report 2, p. 136; in France, Court of Appeal of Paris, 18 February 1986, Revue de l'arbitrage[Arbitration Journal], 1986, p. 583, note Georges Flécheux

65 For example, Swedish law, Supreme Court of Sweden, 27 October 2000, Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc., Mealey's International Arbitration Report, vol. 15, December2000, p. A 1.

66 Fouchard P, Gaillard E and Goldman B, On International Commercial Arbitration, no. 137467

At each of these stages of the arbitral proceedings, electronic communications make the confidentiality less robust, since electronic data are more vulnerable than paper records. Moreover, with the Internet, a confidential piece of information can be disseminated rapidly. The least infringement of confidentiality can have serious consequences for the litigants.

It is therefore incumbent on the online arbitral institutions and the parties to put in place security processes ensuring that the confidentiality of the arbitral proceedings is protected from the dissemination of information caused by inexpert or fraudulent use of information technology.

First of all, e-mails and exchanges of data on the web should be protected, particularly when filling out forms on websites. A recent study reveals that online arbitral institutions rarely apply security to e-mails.[67]

They only ensure the security of online forms using the SSL protocol.[68]

Yet securing e-mails by use of encoding and electronic signature techniques seems vital, especially when written statements and attachments are exchanged. Secondly, every institution needs to be equipped with adequate IT resources to protect its databases from external attack. In practice, it is hard to assess what firewalls the online arbitral institutions have.

Finally, it is difficult to assess whether electronic arbitral institutions are respecting the confidentiality of awards, because there is still only a small amount of arbitral case law. To date there has been no publication of online arbitral awards, although some institutions are planning publication online, either with[69] *or without* [٧٠] *the anonymity of the parties.*

67 Schultz, T et al., Online Dispute Resolution: The State of the Art and the Issues, University of Geneva, accessed on the Internet, December 2001, at: <http://www.online-adr.org>, p. 49

68 Art. 32 (5) of the UNCITRAL Arbitration Rules

69 Online Dispute Resolution

70Virtual Magistrate

The ICC is putting in place a more systematic approach to the security of electronic proceedings with an electronic management system for the arbitral Procedure, entitled "Netcase".[71]

A secure intranet will be created for each Case ‹open only to the parties and the members of the arbitral institution. Each individual, depending on his/her status in the procedure, will have a different level of access to certain documents. For example, the ICC secretariat will not have access to the deliberations when they are carried out online, thus preserving their secrecy.

An overall view therefore needs to be taken of the security of communications and of access to the data in the case. A badly designed computer system or negligent conduct by the parties could lead to the imposition of damages and interest. On contractual grounds, the arbitral institution or the adverse party could be accused of failing to observe the obligation of confidentiality. On criminal grounds, one or other could be accused of an offence if it had negligently used computer resources.[72]

3.3 Administration of Electronic Evidence

"Very often, it is as if rights did not exist ‹because they cannot be proven. An old saying expresses it well: not to be is the same thing as not to be proven."[73]

This saying, quoted by Dean Car bonnier, underlines the traditional importance of evidence in support of arguments in legal proceedings. The unique aspect of electronic commerce operations is that evidence of the legal acts or facts often can only be reported by electronic means. Thus the instrumentum of an Electronic contract will take the form of a computer file.

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71 Gélinas PA, "Les activités arbitrales en ligne de l'ICC" [ICC Online Arbitration Activities], inJustice en Ligne, Paris, 14 September 2001; available on the Internet at: <http://www.justice-enligne.org>

72 It would also be necessary to establish that disclosure of the information following the offense caused damage. See Fouchard P, Gaillard E and Goldman B, On International Commercial Arbitration, No. 1412, p. 774,74

73Jean Carbonnier, Droit civil, introduction [Civil Law, Introduction], 26th ed, Paris: 1999, PUF, No. 174

Likewise, the proof of an act of unfair competition committed on the Internet will be reported by the production of a computer file, for example a screenshot of the competitor website. This being the case, electronic commerce operators must put in place a real "probatory strategy" to provide themselves, as operations progress, with electronic evidence of the legal acts and facts on which their rights are based.

It is all the more important to have such a prefatory strategy because very often the only evidence that they will be able to produce will be electronic. The gathering of electronic evidence is useful in that such evidence is admissible before the arbitral tribunal and carries probative force.

It then becomes necessary to analyse how the arbitrator administers the electronic evidence. Under what conditions is electronic evidence admissible? What is its probative force? These questions are addressed in the following subsections.

3.3.1 Gathering of Electronic Evidence

In electronic commerce, operations are partially or totally performed online. When the operations are partially conducted electronically, the parties' have Physical elements at their disposal that may provide evidence of one phase of the contract only (formation or execution). If the contract for access to database has not been concluded electronically, the co-contractors each have an original version of the contract.

If, on the other hand, the sales contract has been concluded electronically and provides for physical delivery of the goods, the parties then have material evidence of the correct or incorrect execution of the contract. The seller can point to the delivery note, while the buyer can produce the item if it is defective.

Either way, the parties will have to provide electronic evidence of the purely electronic phase of the contract. When the operations are performed entirely online, they consist only of exchanges of data messages between the co-contractors. The contract is initially established electronically, without a hard-copy document being sent, and then executed electronically, without physical delivery or movement of people. This is the case with contracts giving access to databases or for downloading software.

In these scenarios, the "trails" of the formation and execution of the contract are found almost exclusively on the computers of the client and

the Supplier. The electronic evidence thus relates to the whole contractual process. In practice, electronic documents are saved automatically on the company's computers and servers, and sometimes even on the client's.

The computer equipment effectively keeps track of the data flow (messages sent or received).The fact of automatically saving documents is, however, not enough to be considered pre constitution of evidence. It is necessary for the co-contractors to save the trail of their operations in the contractual process in an intelligible and lasting manner. They must, for example, take additional steps to protect themselves against the accidental deletion of data.

A basic means of saving order forms and contractual conditions seems to be within the reach of Internet users in the B2C arena. Internet users can simply print out the various screens that they encounter in the contractual process and thereby keep a timed and dated paper trail of the conditions that have been communicated to them.

If they have a better knowledge of computing, they can take screenshots and keep the web pages stored in their computer memory. New versions of globally popular navigation software made it simple to take screenshots and to file dated web pages in an "album". Internet users wishing to protect themselves against accidental deletion of these contractual data will save them on a reliable external medium, for example by burning them to a compact disk.

For businesses, the gathering of evidence can take much more sophisticated forms. A computer systems expert can collate a large amount of data, without the client even being aware of it. For example, the administrator of a B2Belectronic marketplace will certainly be able to produce the login data of the members. He/she can easily establish that a particular member logged in on a given day, that the member used the personal password for identification purposes and that by his/her conduct failed to observe the conditions of use of the marketplace, i.e. sent spam or distributed false information to other subscribers.[74] *Similarly, the*

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74 United States District Court, Northern District of Illinois, Eastern Division, May 11, 2000, Lieschke ,Jackson & Simon v. Real networks Inc where the general conditions of use of the software were downloaded automatically onto the hard disk of the user at the same time as the software. See CachardO, "La validité des conventions électroniques d'arbitrage en droit des Etats-Unis" [Validity of Electronic Arbitration Agreements in US Law], Revue de l'arbitrage[Arbitration Journal], 2002,vol. 1., pp. 193-200

operator of an electronic commerce B2C site can produce the login data of a client, who did indeed click on the "OK" button, indicating that he/she was aware of the contractual conditions and accepted them. Nevertheless, in some legal systems, case law sometimes limits self-constituted evidence.

In France, for example, the Court of Cassation recalls the principle that "No-one can constitute evidence for himself."[75]

In other words, when the judge bases a decision on a single piece of evidence, this evidence must not have come from one of the parties.

The scope of this oft-invoked principle must not be overstated in cases involving IT.[76] *Case law consistently allows suppliers of water or electricity to establish the proof of the amount they are owed by producing readings from counters that they themselves installed.*[77]

Electronic commerce professionals who are expert in IT systems could therefore exploit the data they have collected in order to prove that they have properly carried out their obligations.

3.3.2 Electronic Evidence before an Arbitral Tribunal

The arbitrator's freedom to organize the procedure allows him/her to ensure the admissibility and probative force of electronic documents. Whether applying a national law or the UNCITRAL uniform rules, the arbitrator will assess the trustworthiness of such documents using convergent criteria. The privileged position of Internet intermediaries who store login information raises the problem of communication of documents by the adverse party and by third parties.

(a) Freedom of the Arbitrator in the Organization of Procedure

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75 Civ. 3rd, November 18, 1997, Contracts, concurrence, consummation [Contracts, Competition, Consumption], 1998, n° 21, note Laurent Leveneur. The decision states that a debtor cannot produce an entry in his/her purchase ledger as evidence of payment of an invoice that he/she claims to havemade. Cass. Civ. 1st, June 23, 1998, Bull. I, n° 220, RTD civ., 1999, p. 402, obs. Jacques Mestre.

76 See the publications of the Demonstration, Evidence and New Technologies Committee of the Paris bar, and the report by Cachard O, "Le barreau et l'émergence des technologies nouvelles.Compte -rendu" [The Bar and the Emergence of New Technologies. Report], Droit de l'informatiqueet des télécoms [Computer and Telecoms Law Review], 1998/3, esp. pp. 124-125

77 Cass. Civ. 1st, March 28, 1995, Dalloz, 1995, jur., p. 517, note Jérôme Huet

When the parties have not chosen the law applicable to the procedure, the Arbitrator has considerable freedom in the administration of evidence. In this situation, the arbitrator may choose as appropriate to abide by a State law or a soft law text. In French law on international arbitration, for example, the arbitrator may determine the State law(s) that will govern the procedure. He/ she may refer to arbitration rules or even resolve the procedural questions directly by taking decisions on a case-by-case basis. [78]

Several systems share this liberal approach, leaving it to the arbitrator to organize the instruction and administration of evidence. The arbitrator decides on the admissibility and probative force of the documents submitted. Thus Articles 24 and 25 of the UNCITRAL Arbitration Rules confer on the arbitrator considerable latitude in the administration of evidence and the organization of hearings. Article25.6 in particular, provides as follows:

> *'The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."*

The UNCITRAL Rules have inspired national laws such as the Tunisian Arbitration Code, Article 64.2 of which states:" The powers conferred on the arbitral tribunal include the power to judge the admissibility, relevance, efficacy, materiality and weight of all evidence produced

"This freedom allows the arbitrator to adapt to new forms of evidence that are submitted by the parties. He/she may therefore declare admissible the electronic documents produced by the parties. That raises far fewer difficulties, because, in principle, all forms of evidence are admissible before the arbitrator. [79]

(b) The Arbitrator and Electronic Documents

The most serious difficulties relate to the probative force of electronic Documents. The risk of fraud that particularly affects data messages is

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78 Article 1494 of the new Civil Procedure Code, para. 2: "If the agreement says nothing on the subject, the arbitrator shall decide on the procedure to the extent necessary, either directly or by reference to a law or set of arbitration rules". In On International Commercial Arbitration, No 1203Fouchard, Gaillard and Goldman express approval of the liberal nature of the regulations.

79 Perrot R, "L'administration de la preuve en matière d'arbitrage (Le droit continental de la preuve)" [Administration of evidence in arbitration cases (Continental Law of Proof)], Revue del'arbitrage [Arbitration Journal], 1974, p. 163

often used as an argument for granting probative force only to electronic documents that are perfectly trustworthy. Such a strict approach cannot be justified, because the law of proof is not based on absolute certainty. The only requirement is to convince the arbitrator on the grounds of reasonable Probability.

In any case, as mentioned earlier, fraud exists with hard-copy Documents as well as electronic ones. The arbitrators should therefore not oppose electronic documents as a matter of principle. The assessment of Admissibility and probative force differs according to whether the parties have or have not chosen the law applicable to the procedure. When the parties have chosen the law applicable to the arbitration procedure, the arbitrator must apply the provisions of the law of proof in order to establish the existence of a legal act. For example, if the parties have submitted the arbitration procedure to French law, the arbitrator must assess the admissibility of the electronic documents according to the criteria set out in Article 1316-1of the Civil Code[80] relating to civil disputes with a value in excess of 800 euro.

Since the reform of the law of proof, "written evidence on an electronic medium has the same probative force as written evidence on a hard-copy medium." [81]

A private agreement concluded by electronic means will, however, have to bear a trustworthy electronic signature supplied by the parties. In French law, an electronic signature is deemed to be trustworthy when it fulfils the conditions established by a decree, largely based on the Directive on Electronic Signatures. The arbitrator will therefore have to verify that the electronic signature is accompanied by a certificate issued by an approved certification authority. When the parties do not submit the arbitration procedure to a particular law, how can the arbitrator decide on the probative force of an electronic document? How can he/she resolve disputes over probative force between two electronic documents? The emergence of a transnational law on electronic documents relieves the arbitrator of the need to resolve these difficulties using a particular national law.

The arbitrator can base a decision both on the UNCITRAL Model Law on Electronic Commerce and on the UNCITRAL Model Law on

80 Article 1316-1 of the Civil Code: "Written statements in electronic form shall be admitted as evidence in the same way as written statements in hard copy, as long as the person from whom they emanate can be duly identified and they can be kept in conditions such that their integrity can be guaranteed."
81 Article 1316-3 of the Civil Code

ElectronicSignatures.Several national laws have in fact incorporated these UNCITRAL texts to a large degree. Article 5 of the Model Law on Electronic Commerce establishes the principle of non-discrimination between hard-copy and electronic documents. The arbitrator could thus base a decision on this Article, and those that follow,[1] [82]to declare admissible the electronic documents produced by the parties.

The Model Law on Electronic Signatures also provides the arbitrator with the criteria that allow an assessment of the trustworthiness of the electronic signatures attached to the electronic documents. 84

This law is implicitly based on the model of asymmetric key encryption. The electronic signature consists of two keys (one public, one private) that the user applies to the document to be signed. It is the responsibility of a third party - the certification authority -to confirm that this pair of keys is indeed allocated to the person claiming town them.

The trustworthiness of the electronic signature can be confirmed by the existence of a link between the signatory and the pair of keys, and it can be assessed using standard criteria that appear in the Community Directive on Electronic Signatures and in various national laws.

The arbitrator will find in Article 10 of the Model Law on Electronic Signatures a non-exhaustive list of criteria for assessing the trustworthiness of electronic signature certificates, including, in particular, the trustworthiness of hardware and software, or procedures for processing certificates.

The greatest difficulties arise when one party contests the authenticity of the documents produced by the other, alleging fraud in the electronic document.

In principle, it is up to the arbitrators to verify the identity of the writer when the authenticity of a document is contested. Where electronic evidence is concerned, the electronic verification of authenticity brings into play Competences and technology that is only available to qualified experts.

In practice, it is sufficient for the arbitrator to confirm that an electronic Signature certificate has been issued by a certification authority inspected and approved in the state in which it is established.

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82 Particularly Article 5 “Legal Recognition of Data Messages”, Article 6 “Writing”, Article 7“Signature”, Article 8 “Original

The electronic certificate, issued by a recognized certification authority, constitutes a form of expert evidence that will often satisfy the arbitrator. However, there has to be a facility for proving when the electronic signature certificate issued by the certification authority is a forgery. The party contesting authenticity should be able to produce an expert's report written by an IT expert. The arbitrator may also take the initiative and order an expert opinion, although he/she is not bound to appoint an expert, even when the parties request this. [83]

(c) Disclosure of Login Data

Information and data messages pass through the servers and computers of the parties and of various Internet intermediaries. Useful information is therefore archived for varying lengths of time on the computers of the suppliers of hosting services, on the servers of the access providers or even on the machines of the administrator of electronic market places. These login data, held by the adverse party or by a third party, could constitute evidence in support of an allegation.

Thus, it would be possible for example to check that a client did indeed log on to the offerer's website and that he/she did indeed view the general conditions.

It would also be possible to establish that the offerer did indeed make an offer at a given price in a discussion forum and that the client's acceptance was sufficient to form a contract. Will the arbitrator be able to obtain these data held by the adverse party or by third parties or be able to order their disclosure? Arbitration rules and national laws generally allow the arbitrator to order the adverse party to disclose the exhibits in its possession.[84]

This injunctive power is however restricted in two ways.

First, the arbitrator does not have any power of emporium, in that he/she cannot constrain a recalcitrant party to disclose documents. The

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83 Perrot R, "L'administration de la prevue en matière d'arbitrage (Le droit continental de la preuve)" [Administration of evidence in arbitration cases (Continental Law of Proof)], Revue de l'arbitrage [Arbitration Journal], 1974, p. 164

84 On these questions, see Fouchard P, Gaillard E and Goldman B, On International Commercial Arbitration, 1290 ff., p. 70387 Article 20 (5) of the ICC Arbitration Rules (1998); Article 24(3) of the UNCITRAL Arbitration Rules; Article 19(3) of the International Arbitration Rules of the American Arbitration Association

arbitrator can however draw conclusions from this refusal to disclose the documents, to the detriment of the recalcitrant party.

Second, the injunction to disclose the documents must be well defined. There is within the arbitration profession a consensus on exactly which documents. In France, article 1460 of the new Civil Procedure Code «If a party holds a piece of evidence, the arbitrator may also order him to produce it»; in the United Kingdom, see Articles 34, 43 and 48 of the English Arbitration Act of 1996. Are to be disclosed, in order to avoid "fishing expeditions".

89 Within these limits, the arbitral tribunal may order the adverse party to produce the exhibits deemed to be relevant; and may draw conclusions from these exhibits or from the refusal to produce them. Similarly, the arbitrator could order a party to provide access to clearly identified computer files. An arbitrator could for example ask to view the report of logins to a web page on a given day.

Of course, this assumes that the party receiving the injunction to disclose has archived and kept the relevant data. Systematic archiving is expensive because it takes up disk space. The data are often deleted automatically after a certain period of time, in which case the arbitrator would not be able to draw anyconclusions.In certain States, the law requires the preservation of login data by hosting companies and access providers.[85]

In principle, access to these data is open to the judge and to the authorities under their powers of criminal investigation. The operators are obliged to delete technical data after a fairly short period and they are forbidden to use them for any purpose other than those provided for in law.

The effects of an injunction made by an arbitrator are therefore even more limited than when the data are archived by the parties. The arbitral tribunal may not draw conclusions from the refusal of the third party to disclose the technical login data. Document bearing his signature accompanied by the certificate of a certification authority.

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85 See in France, Article 29 of Law no. 2001-1062 of 15 November 2001 on day-to-day security, which provides for the preservation of login data "for purposes of research, confirmation and prosecution of criminal offences".

The outcome of an online dispute resolution procedure varies according to the task given to the online dispute resolution body. As we have seen, co contractors who participate in mediation or conciliation must negotiate in Good faith, but they are not bound to come to an agreement. They may abandon the process without going through multiple procedures.

If successful, electronic conciliation or mediation is concluded by a settlement agreement confirming the reciprocal concessions made by the litigants. The main unique feature of this contract is that it will often be an electronic contract. In practice, the parties execute the settlement agreement spontaneously.

The outcome of online mediation or conciliation is therefore in the hands of the parties, before and after the final conclusion of the settlement agreement. By contrast, arbitration raises more issues because it is a binding procedure that ends in the rendering of an award that has the authority of res judicata. Parties that have accepted the arbitral clause may not end the procedure

Unilaterally. That being the case, a recalcitrant party may be tempted to use a number of delaying tactics and an incident during the proceedings and after the award has been made. In these circumstances, there must be a concern over the efficacy of electronic arbitration, particularly when the procedure does not manage to appease the parties. The electronic nature of the procedure appears to threaten the efficacy of the arbitration in two ways. Firstly, electronic arbitration appears not to lend itself to one particular location.

Does the electronic character of the case affect the implementation of rules that are based at the location of the seat of arbitration? Secondly, the spontaneous execution of the award by the losing party is not automatic. Very often, the award has to be ratified in the State where the assets of the losing party are located. What one then sees in international arbitration is the development of a post-arbitral dispute; rather than execute the award, the losing party increasingly often attacks it.

Is an award rendered by electronic means as effective as an award rendered in hard copy? Is it a True award, which the State judge will be able to ratify?

4.1 Seat of Electronic Arbitration

It is difficult to centralize the electronic arbitration procedure in a single

Location, since it is a procedure that brings together litigants and arbitrators who interact from different places? The various procedural acts are performed by means of electronic communications and exchanges of data.

This obvious Multiple location of the arbitration procedure may raise concern because it is Necessary to determine the place of arbitration in order to implement certain Rules (see subsection 4.1.1 below).

The concept of the seat of arbitration overcomes the problem of multiple locations of procedural acts. The seat of Arbitration is in fact a strictly legal concept (see subsection 4.1.2 below).

4.1.1 Utility of Determining Place of Arbitration

Linking the arbitration procedure to a state is useful in determining the rules Applicable to a number of questions. For a long time the location of the arbitration has allowed the law applicable to the procedure to be determined.

The appointment of the assisting judge and the definition of the methods for ensuring the lawfulness of the arbitral award still require the place of arbitration to be determined.

(a) Law Applicable to the Procedure

Traditionally, the view was taken that if the parties did not choose otherwise; the law applicable to the arbitration procedure was that of the seat of arbitration. The choice of seat of arbitration was an implicit indication of the desire to submit the arbitration to the law of that state. This concept has been abandoned in most national laws and it is now considered that the arbitrator is free to decide on the rules applicable to the arbitration procedure when the parties have said nothing on the subject.[86]

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, however, makes reference to the law of the place of arbitration. Article V.1 (d) authorizes the judge in the country where recognition and enforcement is sought, to refuse to recognize and enforce an award when, in the absence of agreement between the parties, "the arbitral procedure was not in accordance with the law of the country where the arbitration took place". The place of arbitration is

86 Fouchard P, Gaillard E and Goldman B, On International Commercial Arbitration, 1178 s., p. 635 ff.

therefore not neutral when the local arbitration law does not allow electronic procedures.

(b) Competence of the Assisting Judge

In some States, the determination of the place of arbitration makes it possible to establish the competence of the assisting judge. Such a judge is sometimes required to provide assistance to the State judge in order to ensure the proper conduct of the arbitration proceedings. For example, in the event of problems with the constitution of the arbitral tribunal, the parties may refer to the President of the Tribunal de grande instance in Paris "for arbitrations taking place in France".[87]

Similarly, in Switzerland Article 179 of the Federal Law on Private International Law gives courts competence in the jurisdiction in which the arbitration has its seat to hear petitions concerning the nomination, challenge and replacement of an arbitrator.

Thus France, Switzerland and Austria base the international competence of the assisting judge exclusively on the place of arbitration.

(c) Ensuring Lawfulness of an Award

Determining the place of arbitration is necessary in order to decide the methods of reviewing the award. A direct application to have the award set aside is Possible when the award has been made on home soil.

French law on International arbitration makes the distinction between "arbitral awards made in France", which may be subject to an application to be set aside, and "arbitral awards made abroad", which must first of all be recognized in France. It is only when an appeal is lodged against the decision to grant or refuse recognition that the review of an award made abroad may take place.

Determining the place of arbitration, therefore, has the effect of linking the award beneficially to a State, namely the State of origin, since "the New York Convention accords both primacy and priority to a legal review performed in the country of origin".[88]

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87 Article 1493 para. 2 of the New Civil Procedure Code

88 Fouchard P, "La portée internationale de l'annulation de la sentence dans le pays d'origine"[International Scope of Setting Aside Awards in the Country of Origin],Revue de l'arbitrage[Arbitration Journal], 1997, p. 331

Indeed, according to Article V.1) e) of the Convention, setting aside the award in the country of origin is a reason to refuse enforcement in other signatory States. If the State in which ratification is requested doesn't have a more liberal arbitration law that allows the circulation of awards, irrespective of whether the original judge has set them aside, then the action taken in the State of origin also deprives the award of any effect in the State where enforcement is sought, which is where the assets are located. Determining "the country in which, or according to the laws of which, the Award was made" is therefore crucial to whether its international circulation is authorized or not.

4.1.2 Seat of Arbitration - a Strictly Legal Concept

Determining the place of arbitration on the basis of objective indices is scarcely conceivable when dealing with electronic arbitration.

The procedural acts are performed remotely. When there is an arbitration panel (rather than a sole arbitrator) comprising arbitrators established in different States, it is not even possible to determine the place of arbitration by relying on the domicile or establishment of the arbitrators. Nor can one use the location of the technical equipment of the arbitral institution (server centers), because their location is incidental and of no significance.

In comparative law there is a tendency not to use the operator's electronic presence or technical equipment to determine his/her location. The determination of the place of arbitration must therefore rest on legal criteria. Rather than research the place of electronic arbitration in terms of its geographical location, the seat of arbitration should be designated, i.e. a legal link needs to be established between the arbitration proceedings and a State.[89]The choice of the seat of arbitration rests initially with the parties, either directly or by reference to the arbitration rules. Failing that, the arbitrators[90] Statistics show that in more than 80 per cent of ICC arbitrations, the parties choose these at of arbitration. [91]

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89 Kaufmann-Kohler G, "Le lieu de l'arbitrage à l'aube de la mondialisation. Réflexions à propos dedeux formes récentes l'arbitrage" [The Place of Arbitration at the Dawn of Globalization. Observation son Two Recent Forms of Arbitration], Revue de l'arbitrage [Arbitration Journal], 1998, p. 517,particularly in relation to Swiss law
90 For the United Kingdom, see Article 3 of the English Arbitration Act; also Article 20 (1) of theUNCITRAL Model Law Dispute Settlement 50determine the seat of arbitration. The fact that procedural acts and hearings take place elsewhere is irrelevant. Case law allows the seat of arbitration to be "a strictly legal concept dependent on the will of the parties".

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It is therefore up to the parties in electronic arbitration proceedings to choose the seat of arbitration.

This choice is made all the more crucial by the fact that the regulations of new online arbitral institutions do not deal with this point.

If the parties fail to designate the seat of arbitration, it is not certain that the arbitral tribunal can do so when the arbitration rules say nothing on the subject.

4.2 Electronic Award

Can an electronic arbitration procedure be concluded by the rendering of an award that will be transmitted exclusively by electronic means? Does the Absence of a hard-copy back-up damage the efficacy of the award? The hardcopy award is normally presented to the judge in the ratification proceedings for appending to the executor form.

It is therefore necessary to confirm whether the electronic form of the award affects its international efficacy. Communication of the award in hard copy to the parties at the end of the procedure also appears to be called into question when the award is made online.

4.2.1 Form of the Electronic Award

International or transnational texts appear to require that the award be written down and that it be signed by the arbitrators, while national laws take less consistent approaches.

(a) International texts

Article IV of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires that the party seeking recognition or enforcement of the award produce the "duly authenticated original award".

If the original is not produced, the successful party in the arbitration will not be able to invoke the New York Convention system, and will therefore not be Able to have the award enforced.

According to IT experts, the requirement for an original cannot be met by the presentation of a computer file, since there is no such thing as a copy or original for such files, and they are infinitely reproducible. However, this frequently raised objection can be overcome by analysing

the function of the original. According to the authors, "the role of the original is essentially to be a point of reference and a means of measuring the fidelity of the copies".[92]

In these circumstances, an electronic document, The integrity of which is guaranteed by third parties and by technology, can be considered an original. In practice it is sufficient for the arbitrators to apply their electronic signature to the document, with a certification authority guaranteeing that the pair of keys belongs to the arbitrator. It would be

Paradoxical not to accept as original an electronic award guaranteed in this way, while elsewhere States admit as authentic acts performed by electronic means.[93] *This flexible interpretation of Article IV of the New York Convention is legitimate from several points of view.*

Firstly, it is based on the "function a equivalent" approach promoted by the Model Law on Electronic Commerce. [94] *Article 8 of the UNCITRAL Model Law thus provides that a data message satisfies the requirements of an original when there is a reliable assurance of its integrity and when it is capable of being displayed to the person to whom it is to be presented. Secondly, eminent authors rightly consider that the object of Article IV of the Convention is to confirm the integrity of the award and the identity of the arbitrators.* [95]

The function of Article IV is thus respected by a secure electronic document. Finally, other texts, such as Article 31.1 of the UNCITRAL Model Law on arbitration, make no mention of an original, but simply require that the award be in writing and that it be signed by the arbitrators. Nevertheless, for greater legal security, the revision of Article IV is envisaged.

(b) National Texts

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92 Lucas A, Devèze J, and Freyssinet J, Droit de l'informatique et de l'Internet [Law on IT and the Internet], Paris, PUF, 2001, 870, p. 577

93For France, see Article 1317 para. 2 of the Civil Code relating to the authentic act: "It may be onan electronic medium if it is established and kept in conditions specified by a decree of the StateCouncil."

94 See the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, United Nations, New York, 1997, 15, p. 20.

95 Fouchard P, Gaillard E and Goldman B, On International Commercial Arbitration, 1675, p. 970.

Some national texts, including French law in respect of domestic arbitration, expressly require the award to be in writing and signed by the arbitrators.[96] Many other States require awards to be in writing,[97] and most States require that it be signed by one or more of the arbitrators. 106 [98]Other texts do not expressly require the award to be in writing. In international arbitration, French and Swiss[99] law do not expressly stipulate that the award be so rendered. Finally, States can legislate to adopt a special text enshrining electronic arbitral awards. In the United States, the Revised Uniform Arbitration Act of 28 August 2000[100] provides for the use of electronic signature by the arbitrators, and its Article 33 is accepted by the various states in the United States.

In conclusion, the legal obstacles to the electronic award can be overcome. When an original is required, the production of an electronic document is Sufficient if a secure electronic signature guarantees its integrity and attribution to the arbitrators.

The general recognition of electronic documents and electronic signature by many States often allows the formal requirements of local arbitration law to be respected. The difficulties that remain are often Practical ones arising at the time of communication of the electronic award.

4.2.2 Communication of the Electronic Award

The arbitral award must first be notified to the litigants. It is then up to them to request ratification of the award. However, in practice, the procedure for producing and depositing the electronic award with the registrar of the State court are still unclear.

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96 Article 1473 of the New Civil Procedure Code.

97 In Germany, Article 1054 (1) ZPO; in the Netherlands, Article 1057 (2) of the Civil Procedure Code; and in Sweden, Article 31 of the Swedish Arbitration Act.

98 In comparative law, exceptions relate to the refusal of one or more of the arbitrators to sign as ameans of expressing a dissenting opinion. They do not concern the actual principle of signature.

99 In France, title V of Volume IV of the New Civil Procedure Cod, and in Switzerland, Article 189para. 2 of the Federal Law on Private International Law do not mention awards in writing.

100 Revised Uniform Arbitration Act, available on the Internet at: <http://www.law.gmu.edu/drc/UAA2000.htm>Dispute Settlement 52

Notification of the award to the parties

The notification of the award to the parties has both a substantive and a Procedural effect. First, it allows the parties to take cognizance of the substance of the decision and to exercise the rights that the award has granted them. The award immediately acquires the authority of res judicata. It is therefore important for the award to be transmitted without alteration. Article 28(1) of the ICC regulations of 1998 thus provides for the Secretariat to notify the" text signed by the arbitral tribunal". Article 26(5) of the arbitration rules of the London Court of International Arbitration of 1998 [101] provides for the transmission of "certified copies". The notification then has a procedural effect because it constitutes the starting point for various time periods for action.[102]

Requests for correction and interpretation,[103] and appeals against the award, must be made within a time period following notification, on pain of the request being dismissed. The date of notification must therefore be certain.

Do IT resources allow these two requirements to be met? Notification by secure e-mail ensures that the award is timed and dated, and guarantees its integrity and attribution to the arbitrators.

(b) Ratification and Deposit of an Electronic Award The low level of computerization of State courts, even those in States that pioneered electronic documents, raises questions over the actual methods of depositing the award and of ratification.

Article 30 of the UNCITRAL Arbitration Regulations provides that the request for interpretation must be made within 30 days of notification of the award.

What is the procedure today for depositing an electronic award with the

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101 London Court of International Arbitration, available on the Internet at: <http://www.lciaarbitration. Com/lcia>.

102 Huet J and Valmachino S, "Réflexions sur l'arbitrage électronique dans le commerce international."[Observations on Electronic Arbitration in International Commerce], Gazette du Palais, 9–11 January 2000, p. 16.

103 Article 29 of the ICC Arbitration Rules of 1998 provides that the parties may request correction of material errors within 30 days of notification of the award to the parties

Registrar's office, when so required by law[104] or desired by the parties? In France,[105] it is the registrar of the court who draws up an act of deposit on a Special register. The magistrate and the depositor must sign the act. The Deposited award then becomes a formal registrar's minute. A system of Electronic registration is therefore necessary, allowing archiving of awards and electronic signature by the judge and the depositor. Electronic justice must therefore develop in line with electronic arbitration.

Some Intranet projects aimed at facilitating the electronic exchange of Documents between lawyers and registrars' offices are already being evaluated and tested in various States.[106]

The general availability of such electronic networks and the establishment of data archiving capacity are indispensable for the judge to be able to have an electronic means of becoming familiar with electronic awards and keeping them. In the case of an award rendered exclusively by electronic means, the production of a computer printout by the party requesting ratification would certainly not be sufficient. In France, for example, the deposit is required by Article 1499 of the New Civil Procedure Code for recognition and enforcement of foreign arbitral awards or when dealing with international arbitration:

"The existence of an arbitral award is established by the production of the Original, accompanied by the arbitration agreement or copies of these Documents that meet all the conditions required to prove their authenticity." A computer printout is at best a copy of the award, but without any guarantee of its integrity or attribution to the arbitral tribunal. In the absence of a connected and compatible computer system

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104 In the Netherlands, see Article 1058 of the Civil Procedure Code

105Concerning the deposit of awards, irrespective of any request for enforcement, see Crépin S, Les awards arbitrales devant le juge français [Arbitral Awards in French Courts], Paris, 1995, 138 ff., who points out that the deposit confers a definite date on the award and puts pressure on the other party to enforce the award spontaneously; in Switzerland, see Article 193(1) of the Federal Law on International Private Law.

106 In France, the "Justice Network" should make it easier for lawyers to ensure that files are in order, since they will be connected to the registrar by electronic means. In the United Kingdom, the Computerization of state justice has also been the subject of some debate sparked by Lord Woolf'sreport entitled "Access to Justice" in 1996. See Henderson L, "Lord Woolf and Information Technology", Information & Communications Technology Law, vol.5, no. 1, 1996, p. 45-55.

installed in the registrar's office at the court, the deposit of an electronic award is therefore impossible.

That explains why an experienced arbitral institution such as the ICC has chosen to continue to publish hard-copy awards bearing the physical signature of thearbitrators.The material difficulties surface again when the arbitrator decides to ratify the award after a prima facie examination of the electronic award and the arbitration agreement.

Traditionally the judge stamps the award to acknowledge receipt.[107] *It is then sufficient for the party benefiting from the award to apply to a Ministerial officer to obtain its mandatory enforcement. In practice, there needs to be an electronic process put in place that allows the judge to make known his/her decision to ratify the electronic award. Above all, it will be necessary for ministerial officers, as well as bailiffs to be connected to the justice network.*

4.3 Conclusion

The natural outcome of an online arbitration procedure is the publication of the award by exclusively electronic means. The obstacles to electronic awards are more practical than theoretical. In theory, an inspired analysis of the functional-equivalent principle and the general acceptance of electronic documents would lead one to believe that an electronic award accompanied by the secure signature of the arbitrators meets the requirements of form set by the law and by international agreements.

However, in practice, the successful party needs the agreement of the ratifying judge of the State in which the assets of the losing party are located.

The successful party also needs the agreement of the huissier in order to carry out any mandatory enforcement. State courts and ministerial officers do not necessarily have the necessary computer resources to receive, examine and archive electronic awards.

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107 In France, the stamp bears the following inscription: "We ... (1st) President of the Tribunal de grande instance, assisted by Mr. ... our registrar, given the minute of the decision opposite, whereas the said decision does not contain anything contrary to the law and to public order. State that the said decision will be enforced in accordance with its purposes and terms. Done at the Palace of Justice at Paris on [date]... and have signed with the registrar

A practitioner concerned about the international efficacy of an award would therefore be well advised to obtain a hard-copy original as well, signed by the arbitrators. This hybrid solution is necessary for the time being, until all State courts where the award may be enforced have become computerized.

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